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## A HISTORY AND ANALYSIS OF BASEBALL'S THREE ANTITRUST EXEMPTIONS

JOSEPH J. MCMAHON, JR.\* AND JOHN P. ROSSI\*\*

### I. INTRODUCTION

What is professional baseball? It is difficult to answer this question without using a value-laden term which, in effect, tells us more about the speaker than about the subject. Professional baseball may be described as a "sport,"<sup>1</sup> our "national pastime,"<sup>2</sup> or a "business."<sup>3</sup> Use of these descriptors reveals the speaker's judgment as to the relative importance of professional baseball to American society. Indeed, all of the aforementioned terms are partially accurate descriptors of professional baseball. When a Scranton/Wilkes-Barre Red Barons fan is at Lackawanna County Stadium<sup>4</sup> applauding a home run by Gene Schall,<sup>5</sup> the fan is engrossed in the game's details. At that moment, the "baseball as sport" motif accurately describes professional baseball. When professional baseball is shut down by differences between players and owners,<sup>6</sup> the "base-

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1. National League of Professional Baseball Clubs v. Federal Baseball Club, Inc., 269 F. 681, 685 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922).

2. Flood v. Kuhn, 407 U.S. 258, 264 (1972).

3. *Id.* at 287 (Douglas, J., dissenting).

4. The Scranton/Wilkes-Barre Club is the minor league Triple-A affiliate club of the Philadelphia Phillies. Lackawanna County Stadium (located in Pennsylvania) has been the home of the Red Barons since 1989.

5. At the time of publication, Gene Schall was the starting first baseman for the Scranton/Wilkes-Barre Red Barons. During 1991 (his junior year at Villanova University), Schall led the NCAA in hitting with a .484 batting average. Dave Caldwell, *This Phils Prospect Is More than a Player*, PHILA. INQ., May 10, 1993, at MC8.

6. Upon beginning the writing of this Article, Major League Baseball (MLB) was marred by the longest strike in its history. Differences between team owners and the Major League Baseball Players Association (MLBPA) led to the cancellation of the 1994 World Series. Many baseball fans wondered whether professional baseball would be played in 1995. In February, 1995, the owners unilaterally renounced several parts of baseball's labor agreement, including the salary arbitration system, anti-collusion protection for free-agent players, and competitive bidding for free-agent players. Jayson Stark, *Baseball's Back in Business Without Lock-out, Opening Day Set*, PHILA. INQ., Apr. 3, 1995, at A6. The players went back to work when the United States District Court for the Southern District of New York

ball as business" motif occupies the newspaper sports pages with mentions of collective bargaining offers and counteroffers.<sup>7</sup> When a university student takes a course discussing the history of baseball and compares the development of our nation with the development of professional baseball, the student is impressed by the portrayal of baseball as our "national pastime."<sup>8</sup>

Defining the scope of professional baseball's antitrust exemption is a task which is as elusive as defining professional baseball. In 1922, the United States Supreme Court held in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*<sup>9</sup> (*Federal Baseball*) that the Sherman Antitrust Act (Sherman Act) did not apply to professional baseball.<sup>10</sup> The Court decided *Federal Baseball* as a matter of statutory interpretation, concluding that professional baseball was not engaged in 1920-style interstate commerce.<sup>11</sup> In order for section one of the Sherman Act to apply to its conduct in 1922, professional baseball would have had to manufacture a product and ship it across state lines.<sup>12</sup>

Understanding the history of professional baseball's antitrust exemptions requires an appreciation of the difference between an antitrust exclusion and an antitrust exemption. The *Federal Baseball* Court did not create an exemption from the antitrust laws.<sup>13</sup> How-

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issued an injunction restoring the aforementioned provisions of the labor agreement. *Id.*

7. See, e.g., Jayson Stark, *Hope Takes Root in the Warmth of Baseball Talks*, PHILA. INQ., Mar. 2, 1995, at D1.

8. Professor Rossi has been teaching a course entitled "America Through Baseball: An Examination of the Relationship Between Baseball and American History, 1830 to the Present" in the History Department at La Salle University for eight years. He occasionally teaches a similar course as an elective offered in the University's Honors Program.

9. 259 U.S. 200 (1922).

10. 15 U.S.C. § 1 (1988 & Supp. IV 1992); see *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. at 209.

11. See *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. at 209. Justice Holmes noted that "personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because [the Leagues require players to travel across state lines and pay for such travel]." *Id.*

12. Gary Hailey, *Anatomy of a Murder: The Federal League and the Courts*, THE NAT'L PASTIME, Spring 1985, at 62, 73.

13. Nothing in the Supreme Court's *Federal Baseball* opinion indicates that the Court believed that baseball was not subject to the Sherman Act simply because it was baseball. The Court based its reasoning upon statutory construction of the terms "trade" and "commerce," and not upon a "recognition and an acceptance of baseball's unique characteristics and needs." *Flood*, 407 U.S. at 282; see *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. at 208-09 (holding that giving exhibitions of baseball is not "trade" or "commerce" for Sherman Act purposes); Barton J. Menitove, Comment, *Baseball's Antitrust Ex-*

ever, the antitrust exclusion defined in *Federal Baseball* is commonly viewed as the source of baseball's exemption from the Sherman Act.<sup>14</sup> If professional baseball is excluded from the Sherman Act, the statute does not apply because the activities of professional baseball do not fall within the range of activities the statute was designed to monitor. Therefore, if the Sherman Act does not apply, professional baseball's activities are incapable of conflicting with the policies underlying the Sherman Act. In the case of an exemption, there is an initial assumption that the Sherman Act may apply, or should apply, to professional baseball. However, because of policy reasons which supersede the underlying policies of the Sherman Act, the Sherman Act does not apply to a particular range of professional baseball's activities which would normally be subject to antitrust scrutiny.

By fusing the exclusion with the exemption, the Supreme Court has created a historical problem which has engaged courts

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*emption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COM. L. REV. 737, 740 (1971) (noting that *Federal Baseball* decision was based upon conclusion that professional baseball was not engaged in interstate commerce).

One of the major failures of legal scholarship on the issue of baseball's antitrust exemption is its willingness to embrace the logical fallacy that, since the *Federal Baseball* Court determined in 1922 that professional baseball was not engaged in "trade" or "commerce" under the Sherman Act, Congress intended for professional baseball to receive special treatment, and therefore professional baseball should not be subject to the antitrust laws. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 360 (1953) (Burton, J., dissenting) (noting that "the [*Federal Baseball*] Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act"); William D. Neary, Note, 32 TEX. L. REV. 890, 892 (1954) (observing that the *Federal Baseball* Court "did not reach the question whether Congress intended the Sherman Act to govern organized baseball in the event that its activities should be categorized as interstate commerce"). There is no justification for inferring a specific congressional intent from judicial construction of statutory terms in this context.

14. This view is erroneous. Baseball did not have an exemption until the Court was willing to uphold *Federal Baseball* as a matter of judicial policy. The exemption was created when the *Toolson* Court decided to uphold the *Federal Baseball* ruling for two primary reasons: first, professional baseball supposedly had developed significant interests by relying upon the *Federal Baseball* holding; and second, Congress had not altered the exemption during the thirty years between the *Federal Baseball* and *Toolson* rulings. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (recognizing that exemption is based upon "baseball's unique characteristics and needs"); *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) (affirming Ninth Circuit's decision on authority of *Federal Baseball*). But see Y. Shukie Grossman, Note, *Antitrust and Baseball — A League of Their Own*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 563, 579 (1993) (arguing that *Federal Baseball* Court granted baseball exemption from federal antitrust laws); Latour Rey Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993), 21 FLA. ST. UNIV. L. REV. 1271, 1292-93 (1994) (contending that MLB has enjoyed antitrust exemption since 1922).

and commentators for more than seventy years.<sup>15</sup> The *Federal Baseball* Court did not hold that the business of exhibiting baseball games was exempt from the antitrust laws. Nevertheless, the Court used the *Federal Baseball* exclusion in deciding both *Toolson v. New York Yankees, Inc.* and *Flood v. Kuhn*.<sup>16</sup> The *Toolson* and *Flood* cases held that professional baseball was exempt from the Sherman Act for judicial and/or public policy reasons.<sup>17</sup>

The task of reconciling the exclusion created by *Federal Baseball* with the exemption established in *Toolson* and *Flood* has been left to lower federal courts and state courts. It is extremely difficult to argue that the *Federal Baseball* Court intended the words "business of baseball" (or any other phrase) to become the parameters which would define the scope of an antitrust exemption.<sup>18</sup> It is even more difficult to argue that courts have justified using the "business of baseball" language (or any other phrase) to define the scope of the exemption.<sup>19</sup>

15. See, e.g., *Professional Baseball Schs. and Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085-86 (11th Cir. 1982) (per curiam) (citing *Flood* to support proposition that MLB is exempt from antitrust laws); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir.) (observing that *Flood* Court followed *Federal Baseball*), cert. denied, 439 U.S. 876 (1978); *Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*, 541 F. Supp. 263, 266-67 (S.D. Tex. 1982) (interpreting *Flood* as following *Toolson* and *Federal Baseball* on stare decisis basis); Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209, 219-21 (1983) (concluding that *Flood* Court refused to overturn *Toolson* and *Federal Baseball*); H. Ward Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369, 381 (1988) (noting that *Flood* Court followed *Toolson* and *Federal Baseball* on stare decisis basis); Remy Kessler, Note, 4 LOY. ENT. L.J. 197, 199 (1984) (interpreting *Flood* as refusing to end *Federal Baseball* exemption).

16. *Flood*, 407 U.S. at 285; *Toolson*, 346 U.S. at 357.

17. *Flood*, 407 U.S. at 285; *Toolson*, 346 U.S. at 357.

18. Some variation of the "business of baseball" language, as used in the *Federal Baseball* opinion, is merely descriptive in nature. The words "business [of] giving exhibitions of baseball" are used to describe the particular business under review. See *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. at 208. One will search the *Federal Baseball* opinion in vain for any indication that the Court intended the "business of baseball" language (or other phrases used by post-*Flood* courts reviewing the exemption) to define the scope of an industry-specific antitrust exemption. The absence of such language is consistent with the view that the *Federal Baseball* Court was not creating, nor did it intend to create, an antitrust exemption for professional baseball based on a policy rationale. Counsel for the National League argued in *Federal Baseball* that, even if Organized Baseball was engaged in interstate commerce, the alleged conduct did not violate the Sherman Act. *Toolson*, 346 U.S. at 360 (Burton, J., dissenting). However, the Court did not address that issue in its ruling. *Id.*

19. The critical observer who reads the opinions of post-*Flood* courts construing the scope of baseball's antitrust exemption will notice that reviewing courts are at a loss to provide a precise citation to support their conclusions. See, e.g., *Professional Baseball Schs. and Clubs, Inc.*, 693 F.2d at 1085-86 (citing *Federal Baseball*, *Toolson*, and *Flood* to support conclusion that business of baseball is exempt from

Even though the *Federal Baseball* Court did not exempt professional baseball from the Sherman Act, courts and commentators have successfully manufactured a *Federal Baseball* "exemption" during the time since the opinion was issued seventy-three years ago. This manufacturing process has led to the creation of professional baseball's three antitrust exemptions. For purposes of this Article the three exemptions are referred to as: first, the "whole business" exemption; second, the "reserve system and league structure" exemption; and third, the "reserve system" exemption.<sup>20</sup>

Part Two of this Article will trace the history of professional baseball's antitrust exemptions around the basepaths, with *Federal Baseball*, *Toolson*, and *Flood* acting as first, second, and third bases, respectively. Part Three will send the runner from third to home by describing baseball's three antitrust exemptions. Part Four will consider the irony of "congressional action" on the issue of baseball's antitrust status. Part Five will consider the meaning of the three exemptions in the antitrust context. Part Six will conclude the Article by using Parts Two through Four as a "backstop" to evaluate the recent litigation concerning the proposed sale and move of the San Francisco Giants to St. Petersburg, Florida.

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antitrust laws). In *Professional Baseball Schs. and Clubs, Inc.*, the Eleventh Circuit did not provide pinpoint citations indicating that the Court has defined the scope of the exemption as the "business of baseball." See *id.* at 1086. Pinpoint citations were not provided because the Court clearly has never defined the scope of the exemption.

As an indication of the confusion surrounding the exemption issue, one federal court recently described the "business of baseball" as language characterizing the exempted *market* (as opposed to describing the language as defining the scope of an exemption which covers *any* market which MLB chooses to participate in). See *Piazza v. Major League Baseball*, 831 F. Supp. 420, 439-41 (E.D. Pa. 1993). Compare *Charles O. Finley & Co.*, 569 F.2d at 541 (holding that "business of baseball, not any particular facet of that business," is exempt from antitrust laws) with *Piazza*, 831 F. Supp. at 439-41 (noting in dicta that exemption not only has limited scope, but is limited to particular market entitled the "business of baseball").

20. See *Charles O. Finley & Co.*, 569 F.2d at 541 (providing example of "whole business" exemption); *Piazza*, 831 F. Supp. at 438 (providing example of "reserve system" exemption); *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475, 1487-89 (S.D.N.Y. 1992) (providing example of "reserve system and league structure" exemption), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

## II. A HISTORY OF BASEBALL'S ANTITRUST EXEMPTIONS

### A. From Home Plate to First Base: The Pre-Federal Baseball Years

#### 1. *The Advent of Professionalism*

Baseball mythology recounts that in 1839, General Abner Doubleday invented the game in Cooperstown, New York.<sup>21</sup> The game's popularity quickly spread throughout New York City and its surrounding vicinity<sup>22</sup> with the organization of the Knickerbocker

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21. BENJAMIN G. RADER, *BASEBALL* 2 (1992); Note, *Baseball and the Law — Yesterday and Today*, 32 VA. L. REV. 1164, 1165 (1946) [hereinafter *Baseball and the Law*]. Baseball's origin was the subject of a debate between Henry Chadwick, the top baseball writer of the late nineteenth century, and Albert G. Spalding, the sporting goods millionaire and owner of the Chicago White Stockings. WARREN GOLDSTEIN, *PLAYING FOR KEEPS* 11 (1989). Chadwick believed that baseball was a descendant of "rounders," an English game. HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* 9 (1960) [hereinafter SEYMOUR, *EARLY YEARS*]. As a young man, Spalding subscribed to Chadwick's theory. PETER LEVINE, *A.G. SPALDING AND THE RISE OF BASEBALL* 112 (1985). However, by 1905 Spalding was convinced that a game that was "so fundamentally representative of American values had to be American in origin." *Id.*

Spalding called for the appointment of a national board to settle the debate. SEYMOUR, *EARLY YEARS*, *supra*, at 9. Seven men were selected: James E. Sullivan, Al Reach, George Wright, Nick Young, Abraham G. Mills, and United States Senators Arthur Gorman of Maryland and Morgan G. Bulkeley of Connecticut. LEVINE, *supra*, at 113. All seven men were arguably interested in the outcome of the debate; all were prominent players in Organized Baseball's early years. SEYMOUR, *EARLY YEARS*, *supra*, at 9. The Mills Commission collected testimony for three years and concluded that General Abner Doubleday devised the game at Cooperstown, New York in 1839. ROBERT W. HENDERSON, *BALL, BAT AND BISHOP* 180 (1947).

In affirming the validity of the "Doubleday myth," the Mills Commission relied primarily on a letter from Abner Graves. ROBERT SMITH, *BASEBALL* 30-31 (1947). A mining engineer who worked in Denver, Colorado, Graves claimed that Doubleday was a classmate of his who "had interrupted a game of marbles behind the local tailor shop to draw a diagram in the shape of a baseball diamond while he explained the game and gave it a name." LEVINE, *supra*, at 113. Several historians dispute the validity of the Doubleday myth for various reasons. First, Doubleday had matriculated at West Point in 1838, making his presence at Green's Select School in Cooperstown in 1839 an impossibility. SEYMOUR, *EARLY YEARS*, *supra*, at 10. Second, it is unlikely that any Commission members besides Mills saw any of the evidence, HENDERSON, *supra*, at 183, and since Mills and General Doubleday eventually became members in the same GAR post, SMITH, *supra*, at 30, there is a reasonable possibility of bias. Third, Americans simply wanted to believe the Doubleday myth more than the rounders theory because nobody wanted to believe that the "national pastime" was of British origin. See SEYMOUR, *EARLY YEARS*, *supra*, at 9. But cf. GOLDSTEIN, *supra*, at 11 (arguing that debate over Doubleday myth is irrelevant because "competing versions of baseball history" have been part of game from its inception).

22. RADER, *supra* note 21, at 5. During 1854 and 1855 at least three new clubs appeared in Manhattan, while seven new clubs appeared in Brooklyn. *Id.* By the summer of 1861 there were at least 200 teams playing in the New York metropolitan area. *Id.*

Base Ball Club of New York.<sup>23</sup> Baseball's popularity grew in 1858 when the twenty-two New York metropolitan area clubs formed the National Association of Base Ball Players (National Association or Association).<sup>24</sup> Initially, the Association was a regional body governed by a constitution and by-laws. The National Association regulated member clubs and their players.<sup>25</sup> Association rules

23. The Knickerbockers "were primarily a social club with a distinctively exclusive flavor — somewhat similar to what country clubs represented in the 1920's and 1930's, before they became popular with the middle class . . ." SEYMOUR, *EARLY YEARS*, *supra* note 21, at 15. Seymour further describes the Knickerbockers as follows:

To the Knickerbockers a ball game was a vehicle for genteel amateur recreation and polite social intercourse rather than a hard-fought contest for victory. They were more expert with the knife and fork at post-game banquets than with bat and ball on the diamond. Their rules and regulations emphasized proper conduct, and the entire tone of their organization was more akin to the atmosphere surrounding cricket — a far cry from the ethic of modern professional baseball.

*Id.* For a discussion of the history of the Knickerbockers, see RADER, *supra* note 21, at 3-5; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 15-21.

24. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 35. The Association governed the game for thirteen years. *Id.* at 37. It was the first centralized governing agency in American baseball history. *Id.* The Association produced a set of common playing rules. *Id.*

The 1858 convention was a follow-up to a 1857 meeting hosted by the Knickerbockers, which was attended by approximately forty delegates representing over twelve metropolitan-area clubs. *See id.* at 35. Although a committee on playing rules was appointed at the 1857 meeting, the committee did not accomplish anything because the young clubs lost interest in the collective effort. *See id.*

25. SEYMOUR, *THE EARLY YEARS*, *supra* note 21, at 36. Harold Seymour explained the requirements of Association membership:

To join the Association a club needed a minimum of eighteen members and was required to submit its application thirty days before the annual convention so its character and standing could be investigated in time to be voted on. A two-thirds vote was required for admission. If a club was not organized until after the convention, it could get probationary status until formally accepted at the next annual meeting. Each member club was allowed two delegates and two votes. Dues were at first five dollars, but over the years were gradually reduced to fifty cents.

The Association regulated players, too. To play in match games, a man had to be a member of his club for thirty days beforehand. If he left one club to join another, he must show a clean financial slate before making the change. No one was eligible to play who received compensation at any time, and no player, umpire, or scorer was permitted to be interested "directly or indirectly" in a bet on the game. This rule was made progressively more stern and explicit, because the inroads of professionalism and betting soon compelled it. To handle disputes and violations the Association set up a nine-man Judiciary Committee. Charges against a player or club were to be submitted to the Secretary of the Association in writing. He turned them over to the Committee, which had to hand down its decision within ten days. However, its rulings were subject to review and reversal by a two-thirds vote of the convention delegates at the end of the year. This later proved to be a fatal weakness.

State and regional associations were pocket editions of the national body. Admission requirements were essentially the same. A player or



prevented players from receiving compensation<sup>26</sup> or betting on games.<sup>27</sup> The Association's work in overseeing the game's development helped to quickly make baseball America's favorite game.<sup>28</sup>

Popularity, however, had its price. The vices of professionalism started to appear at home plate in 1860.<sup>29</sup> Competing teams lured players to join them by using "gifts."<sup>30</sup> Such gifts eventually led to a practice called "revolving." Revolving was a practice where players would enter into agreements with clubs and then break the agreements in order to accept better offers with other clubs.<sup>31</sup> Money became an even bigger factor in baseball once people became willing to pay admission to games.<sup>32</sup> Gambling on the outcome of the games was inevitable and corrupted the game.<sup>33</sup> Unfortunately, the

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club that conspired to throw a game was barred from membership, and, furthermore, member clubs were forbidden to play a team harboring any such player. State judiciary committees were armed with authority to summon members and their books and papers, and to suspend and expel. But they, too, could be overruled.

*Id.* at 36-37.

26. RADER, *supra* note 21, at 21.

27. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 36.

28. See GOLDSTEIN, *supra* note 21, at 72-73. Following the Civil War, new clubs formed at an extraordinary rate. *Id.* at 72. In 1865, New York and Brooklyn clubs represented 30% of the national number; by 1867, New York and Brooklyn clubs represented 15% of the national number. See *id.* at 73. This percentage change signalled a shift of "[t]he center of gravity of the baseball world" to the western United States. *Id.* For a table charting the number of clubs and states represented at Association meetings from 1860-66, see *id.* at 72.

29. In 1860, the Brooklyn Excelsiors reportedly paid Jim Creighton under the table, making him the first known professional baseball player. GOLDSTEIN, *supra* note 21, at 70; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 48-49. Other historians contend that Al Reach was the first professional player. See SEYMOUR, *EARLY YEARS*, *supra* note 21, at 48. Reach played for the Brooklyn Eckfords and the Philadelphia Athletics during the early 1860s. *Id.*

30. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 48.

31. JAMES B. DWORKIN, *OWNERS VERSUS PLAYERS* 41 (1981); GOLDSTEIN, *supra* note 21, at 84-85; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 51. Revolving occurred before the spread of professionalism, but money certainly added a new dimension to its practice. See SEYMOUR, *EARLY YEARS*, *supra* note 21, at 51.

Clubs sought to acquire "revolvers" to strengthen their starting lineups. GOLDSTEIN, *supra* note 21, at 85. Although revolving was covered by the baseball press as early as 1860, criticism of revolving did not begin until 1866, when National Association membership increased from 91 clubs to over 200 clubs. *Id.* Players from New York City and Cooperstown moved to other Northeast and Midwest cities. *Id.* The instability of starting lineups from season to season "both encouraged and distressed baseball commentators, especially those based in the New York area." *Id.*

32. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 49-50. In 1868 the seven or eight most popular clubs combined earned approximately \$100,000 in gate receipts. *Id.* at 50. The Mutuals reportedly earned approximately \$15,000 from playing games for gate receipts. *Id.*

33. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 52. The problem with betting on games was that bettors wanted a sure bet. *Id.* at 53. This inevitably led to "active"

Association did not have the power to control these problems, thereby rendering its attempts to exercise control futile.<sup>34</sup>

The inability of the Association to govern the evils of professionalism underscored a division among member clubs on the professionalism issue itself. The Association's purists gradually conceded that professional baseball was a viable idea.<sup>35</sup> The Association eliminated the distinction between amateur and professional players.<sup>36</sup> America's first all-professional club, the Cincinnati Red Stockings, was organized in 1869.<sup>37</sup> The success of the Red Stockings led to the formation of more professional clubs<sup>38</sup> and gradually eliminated the influence of the amateur clubs within the Association.<sup>39</sup> The trend toward professionalism culminated in the dissolution of the Association in 1871.<sup>40</sup>

During March, 1871, ten professional clubs met in New York and established the National Association of Professional Base Ball

participation by bettors and fixed games. *Id.* In California, there were incidents where, just as a player was about to catch a fly ball or field a ground ball, a bettor who bet on the opposing team would fire a six-shooter with the hope of making the player misplay the ball. *Id.* RADER, *supra* note 21, at 20.

Fixed games were a larger problem than a six-shooter distracting players. Throwing games was referred to as "hippodroming." SEYMOUR, *EARLY YEARS*, *supra* note 21, at 53. The first baseball scandal involved a fixed game. The September 28, 1865 game between the Mutuals and Eckfords was unexpectedly won by the Eckfords, 28-11. *Id.* Later, players Ed Duffy and William Wansley of the Eckfords were accused of offering Thomas Devyr money to throw the game. *Id.* The case was investigated by the Judiciary Committee of the National Association. *Id.* For a discussion of the Devyr case, see GOLDSTEIN, *supra* note 21, at 90-94; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 53-54.

34. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 54. The Association's eligibility rules and its regulations against betting and paying players were ignored because the Judiciary Committee did not punish anyone. *See id.* The Judiciary Committee was only capable of settling minor cases. *Id.*

35. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 55.

36. GOLDSTEIN, *supra* note 21, at 92; *see* SEYMOUR, *EARLY YEARS*, *supra* note 21, at 56 (describing events leading up to the amateur/professional split).

37. RADER, *supra* note 21, at 25. The Red Stockings broke the dominance of New York baseball. GOLDSTEIN, *supra* note 21, at 106. The Red Stockings went through the 1869 season with one loss and one tie, the tie occurring when the Haymakers of Troy, N.Y. angrily left the field in protest of an umpire's decision. RADER, *supra* note 21, at 25. For a discussion of the history of the Cincinnati club before it became a professional club, *see* GOLDSTEIN, *supra* note 21, at 103-08. For a discussion of the history of the Cincinnati club from 1869 until the club's demise in 1870, *see id.* at 112-19; RADER, *supra* note 21, at 25-28; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 59.

38. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 59.

39. *Id.*

40. *See id.* Twenty-six amateur clubs met in New York in March, 1871, and formed the National Association of Amateur Base Ball Players. GOLDSTEIN, *supra* note 21, at 126; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 70. For a discussion of the amateurist movement, *see* GOLDSTEIN, *supra* note 21, at 126-33.

Players (NAPBBP).<sup>41</sup> While the NAPBBP lasted only five years,<sup>42</sup> it changed professional baseball by addressing three issues: establishing an official championship, overseeing rule changes, and enforcing player contracts.<sup>43</sup> Unfortunately, the NAPBBP had no screening mechanism to forecast or assess a club's financial position during the membership application process.<sup>44</sup> This lack of a screening mechanism, combined with high player salaries, led to several club failures.<sup>45</sup> The club failures caused tensions between the financially successful clubs and the other clubs.<sup>46</sup>

These tensions and club financial instability sparked the creation of the National League of Professional Base Ball Clubs (National League) in 1876.<sup>47</sup> The National League admitted fifteen

41. *Baseball and the Law*, *supra* note 21, at 1165.

42. GOLDSTEIN, *supra* note 21, at 134.

43. *Id.* at 135. The NAPBBP had "moderate success" dealing with these issues. *Id.* A "champion" was designated each year, and the NAPBBP was recognized as the authority on baseball rules. *Id.* However, the NAPBBP was no more effective than the National Association in dealing with the issue of revolving. The NAPBBP rules stated that a player could revolve to another team, but would have to wait 60 days before playing in his first game. DWORKIN, *supra* note 31, at 42. Since most revolving occurred during the off-season, this NAPBBP attempt to regulate revolving was useless. See *id.* For a discussion of revolving, see *supra* note 31 and accompanying text.

44. GOLDSTEIN, *supra* note 21, at 146.

45. *Id.*

46. *Id.* Of the five NAPBBP pennants, four were won by the Boston Red Stockings (managed by Harry Wright) and one by the Philadelphia Athletics. *Id.* Both the Red Stockings and the Athletics were commercially successful clubs. *Id.* Benjamin Rader described the primary reason for Boston's dominance:

Boston's phenomenal success stemmed in large part from the recruitment of superior players. Wright had at his disposal his brother George, a superb fielding, hard-hitting shortstop. At second base, he employed Roscoe Barnes, the league's perennial batting champion, and behind the plate was the league's most admired superstar, Jim "Deacon" White. White picked up his nickname because, unlike most of his fellow players, he regularly attended church services, toted a Bible with him wherever he went, and always behaved as 'a gentleman in his professional and private life.' In the pitcher's box, White had big Albert Spalding, who at six feet and two inches in height towered over his contemporaries and was the league's most successful hurler. Spalding compiled a 207-56 won-lost record and a .320 batting average while at Boston. 'On receiving the ball,' read a contemporary account of Spalding's pitching style, '... he gazes at it two or three minutes in a contemplative way, and then turns it around once or twice to be sure it is not an orange or coconut. Assured that he has the genuine article ... and after a scowl at the shortstop, and a glance at homeplate, [he] finally delivers the ball with the precision of a cannon shot.'

RADER, *supra* note 21, at 38; see also LEVINE, *supra* note 21, at 13-19 (describing A.G. Spalding's role in the success of the Red Stockings).

47. GOLDSTEIN, *supra* note 21, at 147. For an excellent discussion of the events leading up to the formation of the National League, see SEYMOUR, EARLY YEARS, *supra* note 21, at 75-85.

teams during its first four years of existence.<sup>48</sup> However, by 1879 the League had lost eight of those teams due to financial difficulties.<sup>49</sup> It was obvious to club owners and managers that player salaries needed to be reduced significantly if they wanted to remain in business.<sup>50</sup> This realization led to the development of the reserve system.

## 2. *The Reserve System*

On September 29, 1879, the National League owners secretly agreed to adopt an idea introduced by Arthur Soden, the owner of the Boston Red Stockings.<sup>51</sup> Soden proposed that each owner be allowed to keep five players off the market.<sup>52</sup> The "reservation" of a player meant that no League team could use his services.<sup>53</sup> Furthermore, no League team could play against a team which fielded a player reserved to another club.<sup>54</sup>

The reserve system saved professional baseball.<sup>55</sup> As intended, the rule reduced club operating expenses by reducing the cost of player salaries.<sup>56</sup> In addition, the reserve system aided the League's competitive balance by preventing the financially-successful teams from contracting with a large number of talented players.<sup>57</sup> Overall, the reserve system improved the financial condition of the National League.<sup>58</sup>

America's economic prosperity was another factor in the improved financial condition of the National League.<sup>59</sup> Industrial

48. Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 586 (1953).

49. *Id.*; see also SEYMOUR, *EARLY YEARS*, *supra* note 21, at 86-87 (detailing club failures during years 1876-1879).

50. GOLDSTEIN, *supra* note 21, at 149; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 106.

51. DWORKIN, *supra* note 31, at 44; LEVINE, *supra* note 21, at 50; cf. Richard B. Blackwell, Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 861 (1971).

52. DWORKIN, *supra* note 31, at 44; Blackwell, *supra* note 51, at 861.

53. DWORKIN, *supra* note 31, at 44; see GOLDSTEIN, *supra* note 21, at 149.

54. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 108.

55. Blackwell, *supra* note 51, at 861; see SEYMOUR, *EARLY YEARS*, *supra* note 21, at 119; see also GOLDSTEIN, *supra* note 21, at 149 (noting that National League President Abraham Mills believed reserve rule served players as well as clubs by bringing stability to National League).

56. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 116; Blackwell, *supra* note 51, at 861.

57. Blackwell, *supra* note 51, at 861; see SEYMOUR, *EARLY YEARS*, *supra* note 21, at 111 (noting that need for competitive balance is argument made by reserve system proponents).

58. DWORKIN, *supra* note 31, at 46-47.

59. RADER, *supra* note 21, at 47.

production, real incomes, and spectator demand for baseball increased during the 1880's.<sup>60</sup> The number of professional teams and leagues grew to meet increased spectator demands<sup>61</sup> and led to the formation of the American Association of Base Ball Clubs (American Association) in 1881.<sup>62</sup> In contrast to the National League, the American Association authorized members to play on Sundays (where permitted by law), set an admission price of twenty-five cents per game (as opposed to the National League admission price of fifty cents per game), and allowed beer to be sold at its games.<sup>63</sup> The American Association used these measures to attract the large population of Americans who were alienated by the National League's stolid, Victorian manners.<sup>64</sup>

The National League considered the American Association to be a serious competitor.<sup>65</sup> The National League also recognized that the reserve system was ineffective if there was a league competing for its players.<sup>66</sup> To combat the American Association threats, National League President Abraham G. Mills negotiated the National Agreement of 1882 between the National League, the American Association, and the Northwestern League (a minor league).<sup>67</sup> The Agreement included the adoption of the reserve rule, allowing each member club to reserve a maximum of eleven players.<sup>68</sup> Together, the parties allied under the National Agreement (or Tripartite Agreement) were referred to as "Organized Baseball."<sup>69</sup>

60. *Id.*

61. *Id.* By the end of the 1880's 19 professional leagues had been created. See *id.* at 47-48 (noting that 17 professional leagues other than Union Association and American Association were formed during decade).

62. *Id.* at 47; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 137.

63. RADER, *supra* note 21, at 47. The CHICAGO TRIBUNE dubbed the American Association the "'Beer Ball League.'" *Id.* Brewery owners sat on the boards of directors for six Association teams. *Id.*

64. *Id.*

65. *Id.* at 48.

66. See SEYMOUR, *EARLY YEARS*, *supra* note 21, at 144 (citing League President Mills' belief that settlement was necessary to financially stabilize National League).

67. RADER, *supra* note 21, at 48.

68. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 146; see also RADER, *supra* note 21, at 48 (noting that agreement guaranteed "mutual recognition of reserved players and the establishment of exclusive territorial rights").

69. "Organized Baseball" is a term which refers to a group of professional leagues allied under a series of National Agreements, the historical analogues of the present-day Major League Agreement between the National and American Leagues. "Professional Baseball" is a broader term than "Organized Baseball;" the term "Organized Baseball" excludes those professional leagues which were not part of the National Agreement.

3. *Interleague Battles, the Beginnings of Professional Player Organizations, and the Enactment of the Sherman Act*

Even after the signing of the National Agreement, Organized Baseball was not immune to competition from competing leagues. One of these competing leagues, the Union Association, was formally organized in 1883.<sup>70</sup> The Union Association was opposed to the reserve system and, by logical extension, Organized Baseball.<sup>71</sup> In response to the threat posed by the Union Association, Organized Baseball passed measures which expelled any National Agreement members who played against Union Association clubs.<sup>72</sup> In addition, Organized Baseball prohibited member clubs from employing any reserved players who previously backed out of contracts and went to the Union Association.<sup>73</sup> These measures did not prevent the Union Association from taking the Northwestern League's best players.<sup>74</sup> Despite its success in drawing players from Organized Baseball, the Union Association dissolved in 1884 due to a lack of competitive balance among its members.<sup>75</sup>

The reserve system caused some dissatisfaction among Organized Baseball's players, which in turn led to the formation of the first union of professional baseball players, the National Brotherhood of Professional Base Ball Players (Brotherhood).<sup>76</sup> Formed in 1885, the Brotherhood was organized as a fraternal group to promote the individual and collective interests of its members and to promote the interests of the game.<sup>77</sup> Brotherhood President John Montgomery Ward spoke out against the one-sided nature of the club/player bargaining process and criticized the reserve system.<sup>78</sup>

In 1887 three Brotherhood representatives met with League officials and requested that salary figures be written into player contracts and that the reserve system be eliminated.<sup>79</sup> Despite its demands, the League declined to write salary figures into player contracts.<sup>80</sup> In addition, the Brotherhood was forced to back off its

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70. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 148; *see also* RADER, *supra* note 21, at 49-50 (describing Union Association founder Henry V. Lucas).

71. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 148.

72. *Id.* at 151.

73. *Id.* at 152.

74. *Id.* at 158.

75. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 159-60.

76. *See id.* at 222 (reprinting statement of dissatisfied player).

77. *Id.* at 221.

78. *Id.* at 222-23.

79. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 223.

80. *Id.*

demand to eliminate the reserve system because it could not propose any viable alternatives.<sup>81</sup> The League partially acquiesced, however, by agreeing to incorporate the terms of the reserve rule into player contracts.<sup>82</sup>

The 1887 settlement between the Brotherhood and the League did not last long. During 1888, the owners adopted the Brush Classification Plan.<sup>83</sup> The Brush Plan grouped players by skill level and paid them according to their level.<sup>84</sup> The players threatened to strike when the League rejected their request to repeal the classification rule.<sup>85</sup> The owners dismissed the strike threat as a ridiculous whim.<sup>86</sup>

The players took action. Brotherhood representatives secretly began organizing a new league by recruiting investors and players to support their plans.<sup>87</sup> On November 5, 1889, the Players' National League of Base Ball Clubs (Players' League) was formally started at a convention of approximately thirty-five players in New York.<sup>88</sup> Although the Players' League refused to adopt the reserve and classification rules, players were still tied to their clubs for a limited period of time and their salaries were frozen at their 1889 classification rule levels.<sup>89</sup>

The battle between the National League and the Players' League, like the Union Association battle, focused on competition for players.<sup>90</sup> The Players' League succeeded in winning over a majority of players.<sup>91</sup> The National League attempted to win back its players from the Players' League.<sup>92</sup> When their attempts failed, the

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81. *Id.* at 224.

82. *Id.* at 223.

83. The Brush Classification Plan was proposed by John T. Brush, owner of the National League's Indianapolis club, at an owner's meeting in 1888. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 224. Under the Plan, managers and owners would grade a player's personal conduct from the previous season. *Id.* at 129. This grade determined the player's salary. *Id.* The best-behaved players were "Class A" players and were paid \$2500 per year; the worst-behaved players were "Class E" players and were paid \$1500 per year. *Id.*

84. *Id.* at 224.

85. *Id.*

86. *Id.* at 225.

87. *See id.* at 225-27 (describing actions taken by Brotherhood in starting new league).

88. RADER, *supra* note 21, at 58-59; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 228.

89. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 229.

90. *Id.* at 233.

91. *Id.*

92. *Id.* The League's efforts to reclaim personnel from the Union Association included repealing the classification rule and bribing players. *Id.*

League went to the courts seeking injunctive relief to prevent National League players from joining the Players' League.<sup>93</sup> The courts generally refused to grant the requested injunctive relief.<sup>94</sup>

The 1890 season was tough for both the Players' League and Organized Baseball.<sup>95</sup> All three major leagues sustained financial losses, and fans were disturbed by newspaper stories detailing interleague squabbles.<sup>96</sup> Peace negotiations between the Players' League and Organized Baseball folded the Players' League and led to the adoption of a new National Agreement in 1890.<sup>97</sup> The new Agreement created a National Board consisting of three members with a chairperson.<sup>98</sup> One Board member represented each of the three parties to the Agreement: the National League, the American Association, and the Western Association (a minor league).<sup>99</sup> The Board was the ultimate authority on all issues ranging from the approval of player contracts to the discipline of member clubs and their players.<sup>100</sup> In addition, the Agreement retained the reserve system.<sup>101</sup>

While the Players' League was being planned, Senator John Sherman of Ohio was planning to play hardball with America's powerful trusts and monopolies. In 1888 Senator Sherman introduced legislation to destroy business combinations which had tradi-

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93. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 235; see Comment, *Organized Baseball and the Law*, 46 YALE L.J. 1386, 1387 n.3 (1937) (citing cases where courts decided not to enforce contract).

94. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 235; see *Weeghman v. Killifer*, 215 F. 289, 295 (6th Cir. 1914) (denying preliminary injunction); *Brooklyn Baseball Club v. McGuire*, 116 F. 782, 783 (E.D. Pa. 1902) (same). But see *Cincinnati Exhibition Co. v. Marsans*, 216 F. 269, 270 (E.D. Mo. 1914) (granting injunction against player from playing with any other team until final resolution of case); *Philadelphia Ball Club, Ltd. v. Lajoie*, 51 A. 973, 976 (Pa. 1902) (finding player's contract reasonable and reinstating plaintiff's case for trial).

Perhaps the most famous attempt to prevent a player from playing in the Players' League was the 1890 case of *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (N.Y. Sup. Ct. 1890). In *Ward*, the New York club sought a preliminary injunction to enjoin Brotherhood President John Montgomery Ward from playing in the Players' League during the 1890 season. *Id.* The Supreme Court of New York refused to grant the injunction because the issue could be resolved by trial before the start of the 1890 playing schedule. *Id.* at 784.

95. See SEYMOUR, *EARLY YEARS*, *supra* note 21, at 239 (noting that all major leagues were "drained" by financial losses).

96. *Id.* at 240. The three leagues were comprised of the National League, the American Association, and the Players' League. *Id.*

97. *Id.* at 240-49.

98. *Id.* at 249.

99. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 249.

100. *Id.*

101. *Id.*



tionally been condemned under the common law as unlawful.<sup>102</sup> The bill was redrafted by the Senate Judiciary Committee after floor debate.<sup>103</sup> Following a bicameral conference committee, the Senate Judiciary Committee version of the bill was signed into law in 1890.<sup>104</sup> Although there was little debate of the underlying economic foundation supporting the Sherman Act,<sup>105</sup> it is evident that the scope of the Sherman Act is much broader than the original bill submitted by Senator Sherman in 1888.<sup>106</sup>

Meanwhile, the adoption of the new National Agreement ended the Players' League battle and laid the foundation for a dispute between the American Association and the National League.<sup>107</sup> Players who left Organized Baseball for the Players' League were allowed to return to the clubs which had reserved them for the 1889 season.<sup>108</sup> However, the Philadelphia Athletics (Athletics) of the American Association failed to reserve Louis Bierbauer and Harry Stovey, two star players who had jumped to the Players' League, for the 1891 season.<sup>109</sup> The Pittsburgh Nationals seized this opportunity to sign Bierbauer.<sup>110</sup> In addition, Stovey left the Association for the National League by signing with the Boston club.<sup>111</sup> The Athletics appealed to the National Board and lost.<sup>112</sup> The Association President Allan W. Thurman cast his National Board vote in favor of the National League on the Bierbauer/Stovey issue.<sup>113</sup>

Despite the Board's decision the Association clubs believed that the National League had violated an implied agreement not to

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102. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 33 (3d ed. 1994).

103. *Id.*

104. *Id.*

105. *Id.* Section one of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988 & Supp. IV 1992).

106. See SULLIVAN & HOVENKAMP, *supra* note 102, at 35 (noting that Act is more expansive than common law approach to restraints of trade).

107. RADER, *supra* note 21, at 61; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251.

108. RADER, *supra* note 21, at 61; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251.

109. RADER, *supra* note 21, at 61; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251.

110. RADER, *supra* note 21, at 61; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251. J. Palmer O'Neill, President of the Pittsburgh club, was nicknamed J. "Pirate" O'Neill for signing Bierbauer. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251. Accordingly, the Pittsburgh club was nicknamed the "Pirates." RADER, *supra* note 21, at 61; SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251.

111. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 251.

112. *Id.*

113. *Id.* at 252.

negotiate with Bierbauer and Stovey.<sup>114</sup> Angered by the loss of the two players, and angered by Thurman's vote, the Association clubs retaliated.<sup>115</sup> Thurman was fired, and the Association formally withdrew from the National Agreement.<sup>116</sup> Further, the Association launched plans to start a club in Cincinnati, which was a National League city.<sup>117</sup> The National Board stood its ground; since the Association broke the reserve agreement, the Board declared all Association players as possible acquisitions for National League teams.<sup>118</sup>

In the wake of the Players' League battle, neither side was in a position to absorb the financial losses which accompanied an interleague battle.<sup>119</sup> The Association was especially incapable of fighting the battle.<sup>120</sup> Internal divisions and poor gate receipts placed the Association in financial trouble.<sup>121</sup> The Association and League owners recognized that the business of baseball would collapse without a settlement.<sup>122</sup> Accordingly, a ten-year peace agreement was negotiated between the leagues.<sup>123</sup> Four Association clubs were combined with the eight League clubs to establish the National League and American Association of Professional Base Ball Clubs (National League).<sup>124</sup>

The National League was initially successful at regaining some financial stability. However, the National League soon discovered that things were not as good as they appeared.<sup>125</sup> Issues such as gambling and gate receipts revealed differences between the owners.<sup>126</sup> Also, there was a lack of competitive balance among National League teams, an issue which could not be addressed because the peace agreement expressly indicated that there was to be no change during the ten-year life of the agreement.<sup>127</sup> Ulti-

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114. *Id.*

115. *Id.* at 252-53.

116. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 252-53.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 257.

121. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 257.

122. *Id.*

123. *Id.* at 260-61.

124. *Id.* The remaining Association clubs were bought out. *Id.*

125. *Id.* at 293.

126. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 294-96.

127. *Id.* at 299-300.

mately, financial pressures forced the National League to buy out four teams in 1899 and form an eight-team league.<sup>128</sup>

The problems which the National League faced during the 1890's left the League vulnerable to attack.<sup>129</sup> The attack came from the Western League, a Midwest-based minor league led by Ban Johnson, which was renamed the "American League" in 1899.<sup>130</sup> After a profitable season in 1900, Johnson developed plans to expand into the East, choosing not to apply for renewed status as a "protected" minor league under the National Agreement.<sup>131</sup> The National League responded by awarding the Kansas City and Minneapolis territories, both homes to American League teams, to a new minor league.<sup>132</sup> Johnson abandoned Minneapolis, Kansas City and Indianapolis, moving the American League teams into Washington, Baltimore, Philadelphia and Boston.<sup>133</sup> This move showed the American League's intent to become a major league.<sup>134</sup>

Like the previous interleague battles, the conflict between the American and National Leagues was characterized by competition for players.<sup>135</sup> The American League was successful at luring National League players by offering salary increases and a chance to get away from the "repressive" conditions of the National League.<sup>136</sup> The American League ignored the reserve clause, and the courts were generally reluctant to enforce the reserve clause.<sup>137</sup> However, the biggest losers in the interleague competition for players were the minor leagues.<sup>138</sup> The National League ignored the National Agreement's provisions against contracting with minor league players at a time when minor league teams party to the Agreement desperately needed adherence to those provisions.<sup>139</sup>

After two years of battling with the American League, the National League owners did not want to face another unprofitable sea-

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128. *Id.* at 305.

129. *Id.* at 306.

130. *Id.* at 308.

131. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 311.

132. *Id.* at 312.

133. *Id.*

134. *Id.* at 313 (quoting statement of Ban Johnson).

135. *See id.* at 313-15 (describing "player-snatching" activity by American and National Leagues).

136. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 314.

137. *Id.*

138. *Id.* at 315.

139. *Id.*

son.<sup>140</sup> American and National League officials met in Cincinnati on January 9, 1903 and settled their differences.<sup>141</sup> After the meeting, a new National Agreement was concluded, setting the foundation for Organized Baseball as we experience it today.<sup>142</sup> Under the 1903 Agreement, both leagues were obligated to respect the reserve rights of member clubs.<sup>143</sup> A uniform contract for both leagues was approved.<sup>144</sup> A three-person National Commission was created to govern the game, consisting of the two league presidents and a chairperson.<sup>145</sup> The minor leagues were party to the new Agreement as well, receiving reserve rights in their players.<sup>146</sup>

From 1903 to 1912 Organized Baseball faced several challenges to its monopsonistic power over the business of baseball.<sup>147</sup> Several of these challenges were serious enough to require organized baseball's attention, such as the Pacific Coast, the Tri-State, and the California State Leagues.<sup>148</sup> Other leagues were feeble, short-lived challenges, such as the Tidewater, the Atlantic, the Dixie and the United States.<sup>149</sup>

#### 4. *American League Baseball Club v. Chase*

The 1914 case of *American League Baseball Club v. Chase*<sup>150</sup> was the first antitrust challenge brought against Organized Baseball.<sup>151</sup> On March 26, 1914, Hal Chase executed the standard player's contract with the Chicago club of the American League.<sup>152</sup> Approximately three months later, Chase gave the Chicago club written notice that he was cancelling the contract.<sup>153</sup> On June 20, 1914, Chase entered into a contract with the Buffalo club of the Federal League.<sup>154</sup>

140. *Id.* at 322.

141. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 323.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. SEYMOUR, *EARLY YEARS*, *supra* note 21, at 323.

147. HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 199 (1971) [hereinafter SEYMOUR, *GOLDEN AGE*].

148. *Id.*

149. *Id.*

150. 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914).

151. GROSSMAN, *supra* note 14, at 576. The term "Organized Baseball" refers to the various leagues party to the National Agreement.

152. *Chase*, 149 N.Y.S. at 7-8.

153. *Id.* at 8.

154. *Id.*

The Chicago club moved to obtain a preliminary injunction preventing Chase from playing for any other club during the period of the March 26 contract.<sup>155</sup> The preliminary injunction was granted, and Chase responded with a motion to dissolve the preliminary injunction.<sup>156</sup> Chase challenged the injunction on the grounds that the National Agreement and the rules and regulations adopted by the National Commission pursuant to the Agreement violated the Sherman Act.<sup>157</sup>

The first issue the Supreme Court of New York considered was the threshold question for application of the Sherman Act: whether Organized Baseball was engaged in interstate commerce.<sup>158</sup> Chase argued that the National Agreement established a system under which players were commodities.<sup>159</sup> According to Chase, baseball players were bought and sold across state lines by various teams, thereby making baseball interstate commerce subject to the Sherman Act.<sup>160</sup> The court rejected this argument, noting that the focus of the National Agreement was the production of baseball games and that such games were not commodities capable of being transported across state lines.<sup>161</sup>

The *Chase* court next addressed whether Organized Baseball was an illegal combination or monopoly in violation of the common law.<sup>162</sup> The Supreme Court of New York ruled that Organized Baseball violated the common law in three ways: first, it encroached upon the right to labor; second, it encroached upon the right to contract; and third, it combined to restrain and control the exercise of a profession.<sup>163</sup> Accordingly, the court granted Chase's motion to vacate the preliminary injunction based upon the common law violations.<sup>164</sup>

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155. *Id.* at 7.

156. *Id.*

157. *Chase*, 149 N.Y.S. at 15-16.

158. *Id.* at 16.

159. *Id.*

160. *Id.*

161. *Id.* According to the court, baseball was not a product to be merchandized, and was therefore outside the province of the federal antitrust laws. *Id.* at 16-17.

162. *Id.* at 17.

163. *Chase*, 149 N.Y.S. at 17.

164. *Id.* at 20.

### 5. *The Federal League*

The Federal League was formed in 1913.<sup>165</sup> The Federal League was a corporation consisting of several member clubs.<sup>166</sup> Each of the club owners held ten shares of stock at \$100 per share.<sup>167</sup> Since the American and National Leagues were making record-setting profits, Federal League President James A. Gilmore had no trouble assembling wealthy capitalists to support the League.<sup>168</sup> By 1915, the Federal League was a direct competitor of Organized Baseball in several cities.<sup>169</sup> The Federal League had clubs in Baltimore, Brooklyn, Buffalo, Chicago, Cincinnati, Cleveland, Newark, Pittsburgh and St. Louis.<sup>170</sup> At its inception, the Federal League honored player contracts with Organized Baseball but refused to honor the reserve clause.<sup>171</sup>

Initially, Organized Baseball was not concerned about the development of the Federal League.<sup>172</sup> However, two events caused Organized Baseball to worry about the Federal League.<sup>173</sup> First, star shortstop Joe Tinker left Organized Baseball and went to the Federal League.<sup>174</sup> Second, the Federal League announced that it would bring an antitrust action against Organized Baseball.<sup>175</sup> The Federal League and Organized Baseball stopped honoring each other's contracts.<sup>176</sup> The practice of "player-raiding" took on a nastier tone than it had in previous interleague battles.<sup>177</sup> As a result, the courts were frequently asked to settle contractual disputes between the leagues.<sup>178</sup>

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165. SEYMOUR, *GOLDEN AGE*, *supra* note 147, at 199.

166. *Id.* at 200.

167. *Id.* Federal League rules required each team to post a \$25,000 guarantee and to give the League the lease to its ball park. *Id.* If the team owned its park, the rules required that ownership rights be given to the League. *Id.* These measures were intended to protect league stability. *Id.*

168. *Id.* Federal League backers included Harry Sinclair, the oil tycoon of "Teapot Dome" fame, and the Ward brothers, owners of Ward's Bakery Company in Brooklyn. *Id.*

169. SEYMOUR, *GOLDEN AGE*, *supra* note 147, at 200.

170. *See id.* (describing 1914 expansion of Federal League from six to eight teams).

171. *Id.* at 201.

172. *Id.* at 199-200.

173. *Id.*

174. SEYMOUR, *GOLDEN AGE*, *supra* note 147, at 199-200.

175. *Id.* at 202-03.

176. *Id.* at 205.

177. *Id.*

178. *See id.* at 203-10 (providing historical background for the *Killifer* case and related cases). Organized Baseball learned its lesson from the Brotherhood and American League battles; instead of going to court to enforce the reserve clause,

The Federal League kept its promise to bring an antitrust action against Organized Baseball.<sup>179</sup> In January, 1915, the Federal League filed an action in the United States District Court for the Northern District of Illinois, alleging violations of sections one and two of the Sherman Act.<sup>180</sup> Judge Kenesaw Mountain Landis, who later became the first Commissioner of Organized Baseball, took the case under advisement for a year.<sup>181</sup>

Judge Landis' favoritism towards Organized Baseball was a bad omen for the Federal League. The Federal League soon discovered the difficulty of competing with Organized Baseball. As the novelty of the Federal League wore off, attendance dropped at League games.<sup>182</sup> Since the Federal League had no minor league affiliations, the Federal clubs were forced to carry approximately thirty players per team and the increased salary expense associated with a large roster.<sup>183</sup> With the death of Robert Ward, one of the Federal League's most significant financial backers, in October, 1915,<sup>184</sup> all financial "indicators" pointed toward a settlement.

Shortly after Ward's death, the competing leagues settled their battle in Cincinnati on December 22, 1917.<sup>185</sup> The antitrust suit before Judge Landis was dismissed with the consent of both the Federal League and Organized Baseball.<sup>186</sup> Under the settlement agreement, Organized Baseball paid \$600,000 to dissolve the Federal League.<sup>187</sup> Two Federal League clubs were merged into Organized Baseball by allowing Federal Club ownership groups to purchase the Chicago Nationals and the St. Louis Americans.<sup>188</sup>

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clubs only brought actions for breach of contract occurring during the term of the agreement. *Id.* at 211.

179. SEYMOUR, *GOLDEN AGE*, *supra* note 147, at 212.

180. *Id.*

181. *Id.*

182. *Id.* at 231.

183. *Id.* at 222.

184. SEYMOUR, *GOLDEN AGE*, *supra* note 147, at 230.

185. *Id.* at 231.

186. *Id.*

187. *Id.*

188. *Id.* at 232. Charles Weeghman and the Chicago ownership group of the Federal League were allowed to purchase the Chicago Nationals. *Id.* Phil Ball and the St. Louis ownership group of the Federal League were allowed to purchase the St. Louis Americans. *Id.* The National League gave the Chicago ownership group \$50,000 toward the purchase price of the club. *Id.*

B. First Base: *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*

Baltimore was the only Federal League member which refused to join the settlement agreement.<sup>189</sup> The Baltimore club brought legal action under the Sherman Act against the National and American Leagues.<sup>190</sup> The Baltimore club alleged that the disbandment of the Federal League and its consequent injury to the Baltimore club constituted a violation of sections one and two of the Sherman Act.<sup>191</sup> Baltimore also alleged that the National Agreement<sup>192</sup> produced the reserve clause system,<sup>193</sup> a contractual mechanism which violated the Sherman Act.<sup>194</sup>

The United States Court of Appeals for the District of Columbia held that the business of providing exhibition baseball games was a "sport" and not "trade" or "commerce" for Sherman Act purposes.<sup>195</sup> The test for interstate commerce which the Court of Appeals applied was whether a good was being imported from one state to another.<sup>196</sup> Using this test, the court concluded that a game of baseball is an exhibition which cannot be transferred across state lines.<sup>197</sup>

Since the restrictions imposed by the reserve system did not directly affect the movement of the Baltimore club in interstate commerce, the Court of Appeals held there was no Sherman Act

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189. *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. 681, 682 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922).

190. *Id.*

191. *Id.*

192. *Id.* at 683. The National Agreement of 1883 linked the major leagues (the National League and American Association) with a number of minor leagues. *Id.* In 1903, the Agreement was "renewed" when the American League became a party to the Agreement. Under the Agreement, minor league players had to enter into a contract containing a reserve clause before they could be employed by any member major league club. *Id.* Baltimore alleged that these contracts enabled the National and American Leagues to control the market for players with major-league skills, causing the demise of the Federal League and its individual clubs. *Id.*

193. Edward G. Coleman, Note, 24 NOTRE DAME L. REV. 372, 374 (1949). The reserve clause was part of the standard baseball contract offered to players under the rules and regulations of the National Agreement. *Id.* For a discussion of the reserve system, see *supra* notes 51-69 and accompanying text.

194. *National League of Professional Baseball Clubs v. Federal Baseball, Inc.*, 269 F. at 683.

195. *Id.* at 684. The Court of Appeals concluded that the test of interstate commerce was importation of goods from one state to another. *Id.* The court also concluded that a game of baseball is an exhibition which cannot be transferred across state lines. *Id.*

196. *Id.*

197. *Id.*



violation.<sup>198</sup> The Supreme Court affirmed, noting that the business of giving exhibitions of baseball was intrastate in character.<sup>199</sup> The Court also noted that the transport of equipment and players across state lines by the National and American Leagues did not transform the exhibitions into interstate commerce.<sup>200</sup>

In short, the *Federal Baseball* holding extends only to a particular business at a particular time — the business of exhibition baseball as it existed in 1922 — and was not intended to extend further.<sup>201</sup> The implication of the *Federal Baseball* Court's reasoning is that Organized Baseball would be subject to Sherman Act scrutiny if a record were established showing that it was engaged in interstate commerce.<sup>202</sup> The *Federal Baseball* decision involved a mixed question of law and fact: whether the facts associated with the particular industry (professional baseball) indicated that such a business was engaged in interstate trade or commerce for Sherman Act purposes.<sup>203</sup>

The *Federal Baseball* ruling was consistent with prior decisions of the Court which refused to extend the definition of "trade" or "commerce" under the Sherman Act to include purely intrastate activities.<sup>204</sup> In the 1895 case of *United States v. E.C. Knight*

198. *Id.* at 688. The court observed that the reserve system was intended to contribute to competitive equality among baseball teams by evenly distributing talent, making the game attractive to fans and, by extension, making clubs profitable. *Id.*

199. *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208 (1922).

200. *Id.* at 209.

201. *See id.* at 208-09. This analysis is confirmed by the following hypothetical. Change the factual record in *Federal Baseball* and suppose professional baseball decided to expand into the manufacturing industry by producing toy dolls of Babe Ruth, Ty Cobb and other baseball heroes. If the plant producing such dolls was located in the state of New York, professional baseball shipped the dolls across state lines to consumers in Pennsylvania and New Jersey, and the profits from toy doll sales exceeded the profits from giving exhibitions of baseball, we arguably have a scenario where the *Federal Baseball* Court would be inclined to subject professional baseball to Sherman Act scrutiny, at least with regard to its business activities in the manufacturing sphere. *See National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. at 684-85. Therefore, examining the *Federal Baseball* reasoning, since the Court did not foreclose professional baseball from antitrust scrutiny, it is difficult to derive support from *Federal Baseball* for an antitrust exemption based upon notions that baseball is "different" from other industries.

202. *See National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. at 684-85.

203. *See id.*

204. *See also Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schs.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (holding that non-commercial aspects of education are not subject to antitrust scrutiny).

Co.,<sup>205</sup> the Court considered whether sale contracts for four sugar refineries in Pennsylvania violated section one of the Sherman Act.<sup>206</sup> The Court distinguished between manufacturing and commercial activity;<sup>207</sup> the Court stated that "the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations."<sup>208</sup> Therefore, the Court concluded that the contracts did not violate section one of the Act.<sup>209</sup>

### C. From First Base to Second Base: The Years Between the Federal Baseball and Toolson Rulings, 1922-1953

From 1922 to 1953, professional baseball changed in several significant ways. Radio coverage of professional baseball became popular following World War II.<sup>210</sup> Organized Baseball began sponsoring interstate advertising.<sup>211</sup> Technological advancements enabled fans to travel across state lines to watch games.<sup>212</sup> In 1947, Jackie Robinson became the first African-American to play major league baseball.<sup>213</sup>

Changes in professional baseball paralleled a shift in the Court's definition of interstate commerce.<sup>214</sup> In 1942, the Court

205. 156 U.S. 1 (1895).

206. *Id.* at 2-3. The contracts at issue gave the American Sugar Refining Company, a New Jersey corporation, "nearly complete control of the manufacturing of refined sugar within the United States." *Id.* at 9.

207. *Id.* at 13-16.

208. *Id.* at 17.

209. *Id.*

210. RADER, *supra* note 21, at 160. During the late 1940's "the number of locally operated AM radio stations doubled." *Id.* Radio broadcasters became household names, such as the Yankees' Mel Allen, the Cardinals' Harry Caray, and Brooklyn's Red Barber. *Id.* Live play-by-play of "away" games did not catch on until the mid-1950's, however; before 1950, the majority of "away" game broadcasts were "re-creations." *See id.*

211. *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 358 (1953) (Burton, J., dissenting) (noting facts indicating professional baseball was engaged in interstate commerce).

212. *Id.*

213. RADER, *supra* note 21, at 151. Prior to becoming a professional baseball player, Robinson was an Army officer during World War II and a five-sport star at UCLA (basketball, football, golf, swimming and track). *Id.* He won the Rookie of the Year Award in 1947. *Id.*

214. *See* John S. Lockman, Note, *Baseball as Interstate Commerce Within the Meaning of the Antitrust Laws*, 5 INTRAMURAL L. REV. 206, 212 (1950) (noting Court's expanded interpretation of Commerce Clause); John J. McQuaide, Note, *Curt Flood at Bat Against Baseball's "Reserve Clause,"* 8 SAN DIEGO L. REV. 92, 95 (1971) (observing that criteria of interstate commerce used in *Federal Baseball* were obsolete by late 1940's).

held in *Wickard v. Filburn*<sup>215</sup> that the activity of growing wheat for intrastate consumption may be subject to federal regulation under the Commerce Clause if the activity "exacts a substantial economic effect on interstate commerce."<sup>216</sup> In determining whether the activity exacts a substantial economic effect on interstate commerce, the Court concluded that the distinction between "direct" and "indirect" effects was irrelevant.<sup>217</sup> This conclusion contradicted the analysis supporting the *Federal Baseball* ruling, which indicated that the distinction between direct and indirect effects was outcome-determinative in evaluating whether the Sherman Act applied in a particular case.<sup>218</sup>

Despite the apparent shift in the Court's definition of interstate commerce, lower courts approved the *Federal Baseball* ruling.<sup>219</sup> In the 1922 case of *Hart v. B.F. Keith Vaudeville Exchange*,<sup>220</sup> the Court refused to affirm the trial court's dismissal of a Sherman Act claim against a vaudeville performance group.<sup>221</sup> The Court reasoned that, after *Federal Baseball*, the question of whether the Sherman Act applied to a particular business was a mixed question of law and fact and remanded the case.<sup>222</sup> Therefore, the lower court had to consider the facts associated with the business under review in deciding the issue of jurisdiction.<sup>223</sup> Similarly, in the 1949 case of *Martin v. National League Baseball Club*,<sup>224</sup> the United States Court of Appeals for the Fourth Circuit interpreted *Federal Baseball* as directing a reviewing court to consider "the proportion of the interstate activities [of the business under review] to the whole business."<sup>225</sup> Accordingly, the Fourth Circuit held that the "bare" allegation that Organized Baseball contracted with broadcast-

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215. 317 U.S. 111 (1942).

216. *Id.* at 124; John W. Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208, 217 (1947).

217. *Wickard*, 317 U.S. at 124.

218. See *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. 681, 686-87 (D.C. Cir. 1920) (noting that there must be direct effect on interstate commerce for Sherman Act to apply), *aff'd*, 259 U.S. 200 (1922).

219. But see *Niemiec v. Seattle Ranier Baseball Club, Inc.*, 67 F. Supp. 705, 712 (W.D. Wash. 1946) (suggesting that shift in Court's definition of interstate commerce may be a basis for reversing *Federal Baseball*).

220. 262 U.S. 271 (1923).

221. *Id.* at 274.

222. *Id.*

223. *Id.*

224. 174 F.2d 917 (2d Cir. 1949).

225. *Id.* at 918.

ing companies was not enough to maintain a Sherman Act challenge.<sup>226</sup>

#### D. Second Base: *Toolson v. New York Yankees, Inc.*

In 1951, the Newark International Club assigned George Earl Toolson's contract to the Binghampton Exhibition Company, but Toolson refused to report to Binghampton.<sup>227</sup> Pursuant to his contract and the rules of Organized Baseball, Toolson was put on the ineligible list of the Binghampton team and was not allowed to play professional baseball.<sup>228</sup> Toolson brought an action under the Sherman Act, alleging that the New York Yankees and the minor league clubs party to the action constituted a monopoly which prevented him from playing baseball.<sup>229</sup>

In a *per curiam* opinion, the Supreme Court affirmed the dismissal of the complaint for lack of subject matter jurisdiction. The *Toolson* Court did not re-examine the rationale supporting the *Federal Baseball* decision.<sup>230</sup> The Court noted that the business of baseball had developed for thirty years on the assumption that it was exempt from the Sherman Act,<sup>231</sup> and that Congress had not removed the exemption during this period.<sup>232</sup>

Justice Burton, joined by Justice Reed, dissented. Justice Burton believed that professional baseball was clearly engaged in inter-

226. *Id.*

227. *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd per curiam*, 200 F.2d 198 (9th Cir. 1952), *aff'd per curiam*, 346 U.S. 356 (1953). This assignment was the baseball equivalent of a demotion; in effect, Toolson was being "demoted" from one minor league club to another club within the Yankees' system.

228. *Toolson*, 101 F. Supp. at 93.

229. *Id.*

230. *Toolson*, 346 U.S. at 357.

231. *Id.* The Court concluded:

Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

*Id.*

An interesting question raised by this holding is: did the *Federal Baseball* Court determine whether Congress intended to subject professional baseball to antitrust scrutiny? While the *Toolson* decision seems to suggest that such a determination was made, the *Federal Baseball* opinion suggests otherwise. McQuaide, *supra* note 214, at 96; see *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 207-09 (1922).

232. See *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, Inc.*, 259 U.S. at 207-09.

state commerce.<sup>233</sup> According to Justice Burton, the *Federal Baseball* Court did not state that professional baseball was exempt from the Sherman Act regardless of whether the business was engaged in interstate commerce.<sup>234</sup> Rather, the *Hart* Court indicated that professional baseball may be subject to the Sherman Act if the "incidental features" of professional baseball grew to the point where they were no longer incidental.<sup>235</sup>

#### E. From Second Base to Third Base: The Years Between the *Toolson* and *Flood* Rulings, 1953-1972

On the eve of the *Flood* decision, professional baseball barely resembled the business reviewed in *Federal Baseball*. The business of baseball continued to change between 1953 and 1972. Franchise relocations occurred frequently.<sup>236</sup> Television coverage of major league games attracted a large audience during the late 1950's.<sup>237</sup> Under the leadership of Marvin Miller, the Major League Baseball Players Association (MLBPA) became an important player in labor issues.<sup>238</sup>

After *Toolson*, the Supreme Court refused to extend the *Federal Baseball* reasoning to other professional activities and sports.<sup>239</sup> In *United States v. Shubert*,<sup>240</sup> the Court was asked to extend the *Federal Baseball* holding to the business of theatrical productions.<sup>241</sup> The Court refused to extend antitrust protection to professional theatrical productions, noting that *Federal Baseball*, *Hart* and *Toolson* together indicated that the exemption was limited to the business of baseball.<sup>242</sup> In 1957, the Court refused to extend the *Federal Baseball* holding to professional football.<sup>243</sup> The *Radovich* Court employed

233. *Toolson*, 346 U.S. at 360 (Burton, J., dissenting).

234. *Id.* (Burton, J., dissenting).

235. *Id.* at 360-61 (citing *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923)).

236. RADER, *supra* note 21, at 172 (observing that teams moved during 1950's and 1960's "to exploit the new population centers").

237. *See id.* at 176-77 (describing CBS team of Dizzy Dean and Buddy Blattner).

238. *Id.* at 186.

239. *See Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (noting that professional basketball is not exempt from antitrust laws); *United States v. International Boxing Club*, 348 U.S. 236, 243-44 (1955) (noting that professional boxing is not exempt from antitrust laws).

240. 348 U.S. 222 (1955).

241. *Id.* at 227.

242. *Id.* at 228-230.

243. *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957).

the same reasoning used in *Shubert*. Toolson restricted the *Federal Baseball* ruling to professional baseball.<sup>244</sup>

While stopping short of endorsing the exemption, the United States Courts of Appeals deferred to the Supreme Court's rulings on the exemption. In *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*,<sup>245</sup> the United States Court of Appeals for the Ninth Circuit interpreted *Toolson* and *Radovich* as indicating that any alteration of the exemption should be done by Congress.<sup>246</sup> Additionally, the United States Court of Appeals for the Second Circuit was not certain that the Court was "ready" to overrule the exemption in 1970.<sup>247</sup> Accordingly, in *Salerno v. American League of Professional Baseball Clubs*, the Second Circuit affirmed the district court's determination that the business of professional baseball was exempt from the antitrust laws.<sup>248</sup>

#### F. Third Base: *Flood v. Kuhn*

In October, 1969, Curt Flood, a thirty-one year-old centerfielder with the St. Louis Cardinals, was traded to the Philadelphia Phillies.<sup>249</sup> Displeased with the trade, Flood complained to the Commissioner's office in December, 1969, asking the Commissioner to make him a free agent.<sup>250</sup> Commissioner Kuhn denied Flood's request.<sup>251</sup> Flood brought an antitrust action against Kuhn challenging the legality of baseball's reserve system.<sup>252</sup> The United States District Court for the Southern District of New York held that baseball's reserve system was shielded from antitrust scrutiny by baseball's exemption.<sup>253</sup> The United States Court of Appeals for the Second Circuit affirmed the district court's determination, noting that the exemption issue was properly reserved to Congress.<sup>254</sup>

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244. *Id.* at 451.

245. 282 F.2d 680 (9th Cir. 1960).

246. *Id.*

247. *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).

248. *Id.*

249. *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

250. *Id.*

251. *Id.*

252. *Id.* Flood was supported by the MLBPA in bringing his antitrust claim. *Id.* n.7.

253. *Flood v. Kuhn*, 316 F. Supp. 271, 278 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

254. *Flood v. Kuhn*, 443 F.2d 264, 272 (2d Cir. 1971) (Moore, J., concurring), *aff'd*, 407 U.S. 258 (1972).

The United States Supreme Court reviewed the common law history of the exemption and the history of congressional activity on the exemption issue.<sup>255</sup> After reviewing the common law and congressional activity regarding the exemption, the Court performed an informal stare decisis analysis of the exemption issue.<sup>256</sup> The Court recognized that the underlying reasoning of the *Federal Baseball* ruling was invalid because professional baseball was engaged in interstate commerce.<sup>257</sup> The Court balanced the fact that the *Federal Baseball* ruling was outdated against baseball's reliance interest in the exemption.<sup>258</sup> The Court concluded that baseball's reliance interest was more significant.<sup>259</sup>

Like the *Toolson* Court, the *Flood* Court concluded that congressional "silence" on the exemption issue indicated congressional approval of the exemption.<sup>260</sup> The *Flood* Court also noted that the Supreme Court had consistently observed that any alteration of the exemption should be done by Congress.<sup>261</sup> Accordingly, the *Flood* Court followed *Toolson*.<sup>262</sup> The Supreme Court dismissed *Flood*'s state antitrust law claims for two reasons: first, state law conflicted with federal policy and regulation of professional baseball;<sup>263</sup> and second, state law is precluded by the Commerce Clause because the burden state law places on interstate commerce is outweighed by the state interest in regulating professional baseball.<sup>264</sup>

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255. The Court's review included an examination of the *Federal Baseball*, *Hart*, *Toolson*, *Shubert*, *International Boxing Club*, *Radovich* and *Haywood* opinions. See *Flood*, 407 U.S. at 269-82.

256. See *id.* at 282-84 (enumerating eight conclusions which Court drew from historical analysis).

257. *Id.* at 282.

258. See *id.* at 282 (noting that baseball's exemption was half-century old and it had "survived the Court's expanding concept of interstate commerce"); see also Mark T. Gould, *Baseball's Antitrust Exemption: The Pitch Gets Closer and Closer*, 5 SETON HALL J. SPORT L. 273, 278 (noting that enormous amounts of capital had been invested in reliance on professional baseball's antitrust exemption); McQuaide, *supra* note 214, at 102 (discussing nature of baseball's reliance interest).

259. *Flood*, 407 U.S. at 284 (following *Federal Baseball* and *Toolson*).

260. *Id.* at 283-84; McQuaide, *supra* note 214, at 98.

261. *Flood*, 407 U.S. at 283; Lafferty, *supra* note 14, at 1277.

262. *Flood*, 407 U.S. at 285 (citing *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953)).

263. *Id.* at 284.

264. *Id.*; see also *Baseball's Antitrust Immunity: Hearing Before the Subcomm. on Antitrust, Monopolies, and Bus. Rts. of the Comm. on the Judiciary*, 102d Cong., 2d Sess. 160 (1992) (statement of Donald M. Fehr, Executive Director, MLBPA) (noting that meaning of *Federal Baseball* had been completely reversed by dismissal of state law claims in *Flood*) [hereinafter *Baseball's Antitrust Immunity*].

### III. FROM THIRD BASE TO HOME PLATE: A DESCRIPTION OF BASEBALL'S THREE ANTITRUST EXEMPTIONS

During the post-*Flood* years, the fact that the Supreme Court has never clearly defined the scope of professional baseball's exemption or the policies supporting professional baseball's exemption has haunted American courts. Today, professional baseball has three antitrust exemptions primarily because the *Toolson* Court failed to recognize the difference between an antitrust exclusion and an antitrust exemption. As a result, the scope of baseball's antitrust exemption has become whatever the reviewing court says it is.

Since *Federal Baseball*, *Toolson* and *Flood* do not provide any helpful guidance as to the bounds of the exemption, courts deciding the matter-of-law issue of whether the exemption applies in a particular case are virtually unconstrained by precedent. Baseball's three antitrust exemptions are the direct result of court attempts to write a policy-grounded exemption into the *Federal Baseball* opinion. The three exemptions are described below.

#### A. *Charles O. Finley & Co. v. Kuhn* and the "Whole Business" Exemption

In *Charles O. Finley & Co. v. Kuhn*,<sup>265</sup> the United States Court of Appeals for the Seventh Circuit decided whether baseball's antitrust exemption was limited to the reserve system. The United States Court of Appeals for the Seventh Circuit concluded that "[t]he Supreme Court has held three times that 'the business of baseball' is exempt from the federal antitrust laws."<sup>266</sup> The court examined language in the *Federal Baseball*, *Toolson*, *Flood* and *Radovich* cases and decided that, despite references in *Flood* to the reserve system, the four opinions together indicate "that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws."<sup>267</sup>

The *Finley* exemption has limits. In a footnote, the Seventh Circuit recognized that the exemption "does not apply wholesale to all cases which may have some attenuated relation to the business of baseball."<sup>268</sup> The court cited *Twin City Sportservice, Inc. v. Charles*

265. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

266. *Charles O. Finley & Co.*, 569 F.2d at 541.

267. *Id.* (footnote omitted).

268. *Id.* at 541 n.51.



*O. Finley & Co.*<sup>269</sup> (*Twin City*) as an example of a case where the relation to the business of baseball was attenuated. *Twin City* was a diversity action based on an alleged breach of a concession contract.<sup>270</sup> The Finley company purchased the Kansas City Athletics and, after the 1967 season, moved the team to Oakland.<sup>271</sup> The defendant argued that the transfer of team ownership, the team's relocation, and change of name to "Oakland Athletics" released the defendant from the concession contract between Twin City and the club, which was entered into eleven years prior to the team's sale and relocation.<sup>272</sup> The defendant impleaded the plaintiff's parent corporation, alleging violations of the federal antitrust laws.<sup>273</sup>

Sitting by designation, Justice Clark identified the relevant product market in *Twin City* as the market for the "supplying of concession services to major league baseball"<sup>274</sup> and did not discuss the issue of whether the exemption applies in this context. Therefore, in *Finley* the Seventh Circuit indicated that the "whole business" exemption does not protect a concession service company which contracts with professional baseball from antitrust scrutiny. Aside from the *Twin City* example of what constitutes an attenuated relation, the Seventh Circuit did not determine the precise meaning of "the business of baseball."

B. *Postema v. National League of Professional Baseball Clubs* and the "Reserve Clause and League Structure" Exemption

*Postema v. National League of Professional Baseball Clubs* involved a female umpire's challenge to allegedly discriminatory conduct on the basis of gender.<sup>275</sup> In deciding whether Postema's state law restraint of trade claims were exempt from antitrust scrutiny, the United States District Court for the Southern District of New York reviewed the *Toolson* and *Flood* opinions, noting that *Toolson* did not re-examine the legal foundation of *Federal Baseball*.<sup>276</sup> Citing *United*

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269. 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

270. *Twin City Sportservice, Inc.*, 365 F. Supp. at 237.

271. *Id.* at 238.

272. *Id.*

273. *Id.*

274. *Id.* at 241.

275. *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475, 1478-80 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

276. *Postema*, 799 F. Supp. at 1487-88.

*States v. Shubert*, the district court observed that *Toolson* was "a narrow application of the doctrine of *stare decisis*."<sup>277</sup>

The district court determined that the *Flood* Court rejected the foundation of *Federal Baseball* by expressly recognizing that professional baseball was a business engaged in interstate commerce.<sup>278</sup> The district court interpreted *Flood* as following *Federal Baseball* and *Toolson* on *stare decisis* grounds, despite the *Flood* Court's recognition that professional baseball was engaged in interstate commerce.<sup>279</sup> The district court interpreted *Flood* as precluding state law antitrust claims where such claims would conflict with baseball's federal antitrust exemption.<sup>280</sup>

After discussing the Supreme Court opinions, the *Postema* court determined the exemption's scope. The district court concluded that *Federal Baseball*, *Toolson* and *Flood* considered the exemption in the "limited contexts" of baseball's reserve system and its league structure.<sup>281</sup> Relying primarily on *State v. Milwaukee Braves, Inc.*<sup>282</sup> and *Henderson Broadcasting Corp. v. Houston Sports Ass'n*<sup>283</sup> (*Henderson*), the *Postema* court also concluded that "the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates."<sup>284</sup>

Borrowing language from *Henderson*, the *Postema* court considered whether professional baseball's employment relations with its umpires are "central enough to baseball to be encompassed in the

277. *Id.* at 1487 (quoting *United States v. Shubert*, 348 U.S. 222, 230 (1955)) (citations omitted) (emphasis in original).

278. *Id.* at 1487.

279. *Id.*

280. *Id.*

281. *Postema*, 799 F. Supp. at 1488.

282. 144 N.W.2d 1 (Wis.), *cert. denied*, 385 U.S. 990 (1966). The *Milwaukee Braves* case involved the state of Wisconsin's challenge to the Braves' move to Atlanta. *Milwaukee Braves, Inc.*, 144 N.W.2d at 2. The state argued that the Braves had agreed with other major league teams to terminate play of major league baseball in Milwaukee, and that such an agreement violated Wisconsin antitrust law. *Id.* The Supreme Court of Wisconsin held that a decision "whether to admit a new member [to the National League] in order to replace an existing member which desired to move to a new area" was protected by professional baseball's antitrust exemption from antitrust scrutiny under state law. *Id.* at 15. The court also held that "the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." *Id.*

283. 541 F. Supp. 263 (S.D. Tex. 1982). The *Henderson Broadcasting Corp.* court considered the issue of whether the business of radio broadcasting was "so much a part of baseball" that professional baseball's antitrust exemption extended to that business. *Id.* at 268. The court answered the issue in the negative, noting that the purpose of the exemption is "to protect the league structure." *Id.* at 267.

284. *Postema*, 799 F. Supp. at 1489.

baseball exemption.”<sup>285</sup> Relying on *Flood*, the court found that such employment relations are not a “unique characteristic or need” of baseball.<sup>286</sup> Therefore, Postema’s claims were not preempted by baseball’s antitrust exemption.<sup>287</sup> In summary, the *Postema* analysis directs a reviewing court to use the *Flood* “unique characteristics and needs” language to determine whether a particular matter is part of “league structure.”

### C. *Piazza v. Major League Baseball* and the “Reserve System” Exemption

The United States District Court for the Eastern District of Pennsylvania recently defined the scope of baseball’s antitrust exemption in *Piazza v. Major League Baseball*.<sup>288</sup> On August 6, 1992, Vincent M. Piazza, Vincent M. Tirendi and four Florida residents (Investors) signed a letter of intent with Robert Lurie, owner of the San Francisco Giants, to purchase the Giants for \$115 million.<sup>289</sup> On August 18, the Investors agreed to organize a limited partnership to purchase the Giants.<sup>290</sup> The Investors executed a limited partnership agreement on August 26, creating Tampa Bay Baseball Club, Ltd. (Partnership).<sup>291</sup> On September 4, pursuant to MLB rules, the Partnership applied to MLB for permission to purchase the Giants and move the team to St. Petersburg, Florida.<sup>292</sup> That same day, Fred Kuhlmann, a member of MLB’s Ownership Committee, directed Lurie to consider other offers to purchase the Giants.<sup>293</sup>

On September 9, National League President Bill White invited George Shinn to make a bid to keep the Giants in San Francisco.<sup>294</sup>

285. *Id.*; *Henderson Broadcasting Corp.*, 541 F. Supp. at 265.

286. *Postema*, 799 F. Supp. at 1489.

287. *Id.*

288. 831 F. Supp. 420 (E.D. Pa. 1993). For an interesting discussion of the *Piazza* case, see Lisa DePaulo, *Biting Back*, PHILADELPHIA, July 1994, at 59; Charles P. Pierce, *Hardball*, GENTLEMEN’S QUARTERLY, May 1994, at 67.

289. *Piazza*, 831 F. Supp. at 422. Lurie agreed not to negotiate with other potential buyers of the Giants and to use his best efforts to aid the Investors in their application to MLB for ownership and transfer of the franchise. *Id.*

290. *Id.* The Investors anticipated that they would form individual corporations to serve as the general partners of the Partnership. *Id.*

291. *Id.* PT Baseball, Inc., a corporation owned by Piazza and Tirendi, was the largest contributor of Partnership capital, contributing 27 million dollars. *Id.*

292. *Id.* Part of the application process is a “background check” on the Investors by MLB’s Ownership Committee. *Id.*

293. *Piazza*, 831 F. Supp. at 423. Kuhlmann was allegedly aware of Lurie’s exclusive agreement with the Investors. *Id.*

294. *Id.*

At a September 10 news conference, MLB Ownership Committee members Kuhlmann and Jerry Reinsdorf expressed reservations with the Partnership application, stating that Piazza and Tirendi had dropped out of the Partnership.<sup>295</sup> On November 10, 1992, MLB formally rejected the Partnership's application for ownership of the Giants.<sup>296</sup>

In their complaint, plaintiffs alleged that MLB conspired to exclude plaintiffs from the market for ownership of existing National and American League teams in violation of the Sherman Act.<sup>297</sup> Defendants moved to dismiss the complaint, arguing that the business of baseball was exempt from Act coverage.<sup>298</sup> The district court ruled in favor of the plaintiffs, interpreting *Flood* as narrowing MLB's antitrust exemption to its reserve system.<sup>299</sup>

How did the *Flood* Court narrow the exemption? The *Piazza* court conceded that, prior to the *Flood* ruling, the "business of baseball" may have been exempt from the Sherman Act.<sup>300</sup> However, the *Flood* Court narrowed the scope of the exemption by limiting the precedential value of *Federal Baseball* and *Toolson* to the reserve system.<sup>301</sup> The *Piazza* court interpreted *Flood* as employing a "two-prong" approach in limiting the exemption's scope.<sup>302</sup> First, the *Flood* Court rejected the *Federal Baseball* reasoning by recognizing that professional baseball was a business engaged in interstate commerce.<sup>303</sup> Second, the *Flood* Court justified "the continued precedential value of the result of [*Federal Baseball*]," noting that "continued positive congressional inaction and concerns over retroactivity" were factors supporting a limited antitrust exemption.<sup>304</sup>

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295. *Id.* at 422. On September 10, 1992, Kuhlmann stated that there was a background question regarding two of the Investors and that the money of those two Investors would not be accepted. *Id.* Reinsdorf stated that the background question related to the "out-of-state" money and that the Pennsylvania Investors had dropped out. *Id.* Piazza and Tirendi, as owners of PT Baseball, Inc., were the only members of the Partnership from Pennsylvania. *Id.*

296. *Id.*

297. *Piazza*, 831 F. Supp. at 423-24.

298. *Id.* at 429.

299. *Id.* at 436. *Contra* Julie Dorst, Comment, *Franchise Relocations: Reconsidering Major League Baseball's Carte Blanche Control*, 4 SETON HALL J. SPORTS L. 553, 593 (1994) (contending *Piazza* court held that Sherman Act applies to reserve clause).

300. *Piazza*, 831 F. Supp. at 435-36.

301. *Id.* at 436.

302. *Id.*

303. *Id.*

304. *Id.*

In *Piazza*, the district court asserted that it was not obliged to follow the reasoning of *Federal Baseball* or *Toolson*.<sup>305</sup> The court distinguished between two types of stare decisis: "rule" stare decisis and "result" stare decisis.<sup>306</sup> The American system of precedent is based on rule stare decisis, a principle which requires a court to adhere to the reasoning and the result of a controlling case.<sup>307</sup> The English system of precedent is based on result stare decisis, a principle which requires a court to follow the result of a case which is "on point."<sup>308</sup>

According to the *Piazza* court, *Flood* created a result stare decisis situation by recognizing that professional baseball was engaged in interstate commerce.<sup>309</sup> Therefore, the *Piazza* court determined that no rule binds lower courts determining whether baseball's antitrust exemption applies in a particular case.<sup>310</sup> After *Flood*, the reserve system was the only remaining exempt restraint on interstate commerce.<sup>311</sup> In short, *Piazza* directs a reviewing court to determine whether the matter at issue involves an antitrust challenge to professional baseball's reserve system. If the reserve system is being challenged, the exemption applies.<sup>312</sup>

#### IV. THE IRONY OF CONGRESSIONAL ACTION ON THE EXEMPTION ISSUE

From 1952 to 1995 Congress has held numerous hearings on the issue of baseball's antitrust status.<sup>313</sup> These hearings were frequently accompanied by efforts to alter baseball's antitrust status, ranging from legislation designed to exempt all professional sports from antitrust scrutiny to legislation which eliminated baseball's

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305. *Piazza*, 831 F. Supp. at 438.

306. *Id.* at 437-38 (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 692 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 112 S. Ct. 2791 (1992); see Lafferty, *supra* note 14, at 1287-88 (discussing rule stare decisis and result stare decisis)).

307. *Planned Parenthood*, 947 F.2d at 692.

308. *Id.*

309. *Piazza*, 831 F. Supp. at 438.

310. *Id.*

311. *Id.*

312. In dicta, the *Piazza* court indicated that, even if its analysis was incorrect, the "expansive version of the *Federal Baseball* exemption" (the "business of baseball" exemption) applies only to a particular product market: the market for the exhibition of baseball games. *Id.* at 439-40. Therefore, if *Piazza* established that the relevant product market was the market for purchase of existing major league baseball teams, the court argued that the exemption would not protect MLB's conduct from antitrust scrutiny. *Id.*

313. See, e.g., *Baseball's Antitrust Immunity*, *supra* note 264.

special antitrust status.<sup>314</sup> At the hearings, various arguments were made in support of and against baseball's antitrust protection.<sup>315</sup> Ironically, congressional action has only led to congressional inaction. Congress has never enacted legislation altering baseball's antitrust status as defined by the courts.

Congressional "silence" has been interpreted by the Supreme Court as tacit approval of baseball's common law antitrust protection.<sup>316</sup> However, the notion that congressional intent can be inferred from congressional inactivity is troublesome.<sup>317</sup> Many valid inferences are possible from congressional inactivity on the exemption issue.<sup>318</sup> For example, suppose that congressional inaction means that Congress is united in its desire to remove baseball's exemption but cannot reach a consensus as to the way to remove it. Consider the possibility that congressional inaction indicates some members of Congress want to narrow the exemption and other members of Congress want to extend antitrust protection to all professional sports. The two aforementioned inferences are no less correct than the inference adopted by the Court in *Toolson* and *Flood*.

If we assume that the *Toolson* and *Flood* Courts upheld a broad exemption from the antitrust laws (complete antitrust immunity or something close to it), then deriving congressional intent from congressional inaction was particularly unjustified in the context of those cases. Historical evidence indicates that Congress believed that professional baseball was subject to the antitrust laws.<sup>319</sup> In 1952, the House Subcommittee on Study of Monopoly Power reported unfavorably on several bills which would have extended complete antitrust immunity to professional baseball:

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314. See, e.g., S. 2401, 103d Cong., 2d Sess. (1994) (creating a National Commission to govern professional baseball); S. 500, 103d Cong., 1st Sess. (1993) (amending Clayton Act to make antitrust laws applicable to professional baseball).

315. See *Baseball's Antitrust Immunity*, *supra* note 264, at 365 (statement of Roger G. Noll, Morris M. Doyle Professor, Stanford University) (arguing that removing exemption would not solve problem of franchise scarcity); *id.* at 54 (statement of Sen. Dianne Feinstein) (arguing that antitrust protection for league decisions regarding purchase and sale of franchises promotes franchise stability).

316. See *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (refusing to withdraw from *Toolson* conclusion that congressional inaction indicates approval of exemption); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (noting that Congress refused to alter exemption during 30 years following *Federal Baseball*).

317. See *Helvering v. Hallock*, 309 U.S. 106, 119-120 (1940) (arguing that explaining the cause of inaction by Congress without evidence is unjustified); Neary, *supra* note 13, at 891 (discussing possible reasons for congressional inaction).

318. Neary, *supra* note 13, at 891.

319. *Id.* at 892.

[B]efore recommending a carte blanche immunity [for professional baseball], this subcommittee would have to place its stamp of approval on every aspect of the game as now conducted. The subcommittee would thus be approving important practices which representatives of organized baseball have themselves condemned . . . . If a blanket immunity were granted, all appeal to the courts from a possibly arbitrary decision by the rulers of professional baseball would be foreclosed. In the past the reserve clause has been employed as a "war measure" to right the development of competing leagues, sometimes at the expense of individual players. Although instances of arbitrary exercise of power have been rare, they have occurred in the past. The possibility, however remote, that power will be misused in the future makes it unwise perpetually to preclude resort to the courts in such cases.<sup>320</sup>

This evidence undercuts the Court's basis for deriving congressional intent from congressional inaction. Regardless of whether the House Subcommittee had an accurate understanding of the scope of baseball's antitrust exemption in 1952, the report demonstrates that Congress contemplated antitrust review of the conduct of Organized Baseball.<sup>321</sup>

#### V. AN ANTITRUST ANALYSIS OF THE THREE EXEMPTIONS

In dicta, the *Piazza* court noted that, even if the exemption was not limited to the reserve clause, the exemption applies only to a particular market — "the market comprised of baseball exhibitions."<sup>322</sup> This observation raises the issue of whether the semantic differences captured in the *Finley*, *Postema* and *Piazza* opinions are capable of precise antitrust translation. What types of relationships are covered by baseball's three exemptions? What kind of conduct is covered by the three exemptions? Is the *Piazza* court correct in characterizing the exemption as being limited to a particular market? In this section of the Article, the three exemptions in the antitrust context will be considered.

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320. H.R. Rep. No. 2002, 82d Cong., 2d Sess. 230 (1952).

321. A variation of this argument was made by counsel for the plaintiff in *Piazza*. See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint at 28-30, *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (No. 92-CV-7173). The court did not address this argument in its opinion.

322. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 439-40 (E.D. Pa. 1993).

Section one of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade.<sup>323</sup> A plaintiff in a private antitrust action "must demonstrate a causal connection among the following: (1) injury suffered, (2) to business or property, by (3) the violation of an antitrust law."<sup>324</sup> More specifically, in order to establish a *prima facie* case under section one, a plaintiff must show: first, a contract, combination or conspiracy; second, a restraint of trade; and third, injury to competition in a relevant product market.<sup>325</sup>

When considering antitrust claims under section one of the Sherman Act, a court must characterize challenged restraints to determine which antitrust principles govern its analysis. Once a court determines that there is a contract, combination or conspiracy in restraint of trade, the court characterizes the alleged conduct.<sup>326</sup> If the court characterizes the alleged conduct as being "clearly anticompetitive," such as price fixing, it can be "conclusively presumed illegal without any further inquiry."<sup>327</sup> However, if the challenged conduct is not characterized as being inherently anticompetitive, the court will determine whether the conduct "has an unlawful purpose or anticompetitive effect."<sup>328</sup> In making this determination, the court will engage in a rule of reason analysis, which involves a "detailed factual inquiry which will scrutinize the purpose and the effect of the practice and reasonable inferences derived therefrom."<sup>329</sup> If the court finds that the conduct has an unlawful purpose or anticompetitive effect, the conduct violates section one.<sup>330</sup>

### A. The Supreme Court Trilogy

*Federal Baseball* involved two antitrust challenges under section one of the Sherman Act.<sup>331</sup> The first challenge was to the National

323. 15 U.S.C. § 1 (1988 & Supp. IV 1992). For the text of section one, see *supra* note 105 and accompanying text.

324. SULLIVAN & HOVENKAMP, *supra* note 102, at 80 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)).

325. See *Mid-South Grizzlies v. NFL*, 550 F. Supp. 558, 567 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

326. See SULLIVAN & HOVENKAMP, *supra* note 102, at 184-85.

327. *Mid-South Grizzlies*, 550 F. Supp. at 565 (citing *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)); SULLIVAN & HOVENKAMP, *supra* note 102, at 185.

328. SULLIVAN & HOVENKAMP, *supra* note 102, at 185 (emphasis in original).

329. *Id.*; see also *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (outlining relevant factors in rule of reason analysis).

330. See SULLIVAN & HOVENKAMP, *supra* note 102, at 185.

331. *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. 681, 682-83 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922).



Agreement.<sup>332</sup> The second challenge was to the reserve system, which was part of the National Agreement.<sup>333</sup> The trial court charged the jury to determine whether Organized Baseball conspired to destroy the Federal League.<sup>334</sup> On appeal, the *Federal Baseball* Court held that a particular business (the business of exhibiting baseball games) was not subject to scrutiny under the Sherman Act because the business was not "trade" or "commerce."<sup>335</sup> By holding that the Sherman Act did not apply to the business of exhibition baseball, the *Federal Baseball* Court effectively held that the Sherman Act did not apply to any business entity devoted exclusively to the business of exhibiting baseball games.<sup>336</sup>

The agreements challenged in *Federal Baseball* were intraleague and interleague agreements which established the reserve system.<sup>337</sup> The reserve system prevented players under contract with National Agreement teams from moving to a competing league.<sup>338</sup> The reserve system gave Organized Baseball "control over practically all available players of sufficient skill to serve in a major league club."<sup>339</sup> Therefore, the reserve system was the mechanism by which Organized Baseball attempted to prevent entry by competitors into the market for exhibiting baseball games and a means to eliminate existing competitors.<sup>340</sup>

In sum, the reserve system agreements analyzed by the *Federal Baseball* Court were agreements between leagues which can be loosely classified as group boycotts. There is no indication that the *Federal Baseball* Court limited its analysis to a particular product market. Rather, the *Federal Baseball* analysis was limited to a particular industry which was engaged in several product markets — for example, the market for sale and purchase of baseball equipment and the market for exhibiting baseball games.<sup>341</sup>

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332. *Id.*

333. *Id.*

334. *Id.* at 684.

335. *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

336. *Id.* at 209.

337. *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. at 683.

338. For an explanation of how the reserve system works, see *infra* notes 51-69 and accompanying text.

339. *National League of Professional Baseball Clubs v. Federal Baseball Club, Inc.*, 269 F. at 683.

340. *Id.*

341. *See id.*

Like *Federal Baseball*, the *Toolson* and *Flood* cases stemmed from challenges to the interleague and intraleague agreements which established baseball's reserve system.<sup>342</sup> Since *Toolson* and *Flood* were both decided as a matter of law on stare decisis grounds, both opinions add little (if anything) to understanding the antitrust contours of the exemption. Therefore, after *Flood* it is reasonable to assume that the American and National Leagues can implement the reserve system without being subject to antitrust scrutiny.<sup>343</sup> The precise holdings of *Federal Baseball*, *Toolson* and *Flood* differ, but all three opinions state that professional baseball was either not covered by the language of the Sherman Act or was exempt from the statute for policy reasons, regardless of how the product market was defined.<sup>344</sup>

### B. The Three Exemptions

The *Finley* court examined whether a decision by the Commissioner of MLB to disapprove player trades under the Commissioner's "best interests of baseball" authority was an illegal restraint of trade in violation of section one of the Sherman Act.<sup>345</sup> The Seventh Circuit decided that the exemption protected the Commissioner's decision from antitrust scrutiny.<sup>346</sup> Therefore, the *Finley* result indicates that decisions by the Commissioner regarding player trades under the Commissioner's "best interests of baseball" authority are exempt from antitrust scrutiny.<sup>347</sup> By holding that the business of baseball was exempt from the Sherman Act, the Seventh Circuit suggested that MLB escapes antitrust scrutiny regardless of how the alleged trade restraint is characterized and regardless of how the product market is defined.<sup>348</sup>

The *Postema* court considered a female umpire's common law restraint-of-trade claim stemming from her discharge and subse-

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342. *Flood v. Kuhn*, 407 U.S. 258, 265-67 (1972); *Toolson v. New York Yankees*, 101 F. Supp. 93, 94 (S.D. Cal. 1951), *aff'd per curiam*, 200 F.2d 198 (9th Cir. 1952), *aff'd per curiam*, 346 U.S. 356 (1953).

343. *See Flood*, 407 U.S. at 285; *Toolson*, 346 U.S. at 357.

344. *Flood*, 407 U.S. at 285; *Toolson*, 346 U.S. at 357; *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922).

345. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

346. *Charles O. Finley & Co.*, 569 F.2d at 541 (holding entire business of baseball exempt from Sherman Act).

347. *Id.*

348. *See id.*

quent inability to obtain a job as a major league baseball umpire.<sup>349</sup> The court concluded that the exemption did not apply to "baseball's relations with non-players."<sup>350</sup> Accordingly, Postema was allowed to pursue her common law claim.<sup>351</sup> The *Postema* analysis indicates that the issue of whether alleged anticompetitive conduct is covered by the exemption is a matter-of-law determination for the court.<sup>352</sup> While the *Postema* court did not use clear guidelines in making the matter-of-law determination, the court indicated that the context of the anticompetitive conduct is crucial in determining whether the exemption applies.<sup>353</sup>

The *Piazza* court considered a challenge to an allegedly arbitrary decision by MLB to deny an investor group permission to purchase the San Francisco Giants.<sup>354</sup> The *Piazza* court held that the antitrust exemption was limited to a particular restraint of trade: the reserve clause.<sup>355</sup> The *Piazza* court suggested that the exemption was limited to the reserve clause regardless of the identified product market.<sup>356</sup>

In dicta, the *Piazza* court indicated that its narrow construction of the exemption might be rejected on appeal.<sup>357</sup> Accordingly, the *Piazza* court offered an alternative argument in support of its conclusion. The *Piazza* court contended that it was irrelevant whether or not its narrow construction was correct, because the "business of baseball" exemption was limited to a particular product market — the market for exhibiting baseball games.<sup>358</sup> Ultimately, the *Piazza* court concluded that the exemption was conduct-based and that the "business of baseball" construction of the exemption was market-based.

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349. *Postema v. National League of Professional Baseball Clubs*, 799 F. Supp. 1475, 1486 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993).

350. *Postema*, 799 F. Supp. at 1489. The court reasoned that "baseball's relations with non-players are not a unique characteristic or need of the game." *Id.*

In 1961, Congress addressed baseball's relations with a group of non-players when it enacted a statutory antitrust exemption protecting agreements covering the telecast of professional sports contests. See 15 U.S.C. § 1291 (1988 & Supp. IV 1992).

351. *Postema*, 799 F. Supp. at 1489.

352. See *id.* at 1486-89.

353. *Id.* at 1489.

354. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 422-23 (E.D. Pa. 1993).

355. *Id.* at 438.

356. See *id.* at 439.

357. See *id.* at 441.

358. *Id.* at 439-40.

## VI. EPILOGUE: THE "ST. PETERSBURG GIANTS" LITIGATION

A. *Butterworth* and *Piazza*: The "Reserve System" Exemption Is Incompatible with *Flood*

*Butterworth v. National League of Professional Baseball Clubs*<sup>359</sup> (*Butterworth*) was the companion litigation to *Piazza*. In *Butterworth*, the Attorney General for the State of Florida issued civil investigative demands (CID) to the National League and its President pursuant to Florida law.<sup>360</sup> The National League petitioned the Florida trial court to quash the CID on grounds that the Attorney General lacked jurisdiction to investigate the matters relating to the sale of the Giants because baseball was exempt from state and federal antitrust laws.<sup>361</sup> The trial court issued an order to quash the CID.<sup>362</sup> The trial court held that baseball's antitrust exemption protected the matters which the Attorney General wanted to investigate.<sup>363</sup> The appellate court affirmed the trial court's judgment without discussing the scope of the exemption.<sup>364</sup>

The Supreme Court of Florida reversed.<sup>365</sup> The court considered *Finley* and various other cases construing the exemption.<sup>366</sup> The court was persuaded by *Piazza* and chose to adopt the *Piazza* interpretation because "none of the other cases have engaged in such a comprehensive analysis of *Flood* and its implications."<sup>367</sup> Accordingly, the Supreme Court of Florida held that baseball's antitrust exemption does not extend to the "franchise sale and relocation" context.<sup>368</sup>

The problem with the "reserve system" exemption is that it is based upon a blatant misconstruction of *Flood*. The *Piazza* and *Butterworth* courts failed to reconcile their piecemeal interpretation of

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359. 644 So. 2d 1021 (Fla. 1994).

360. *Id.* at 1022.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d at 1022.

365. *Id.* at 1025. Senior Justice McDonald dissented, noting that the "exemption protects business activities which are directly related to the unique needs and characteristics of professional baseball." *Id.* at 1026 (McDonald, J., dissenting). According to Senior Justice McDonald, decisions like the one involved in *National League* — decisions "concerning ownership and location of baseball franchises" — are within the exemption's scope. *Id.* (McDonald, J., dissenting).

366. *See id.* at 1022-25. Among those discussed were *Federal Baseball*, *Toolson* and *Piazza*. *Id.*

367. *Id.* at 1025.

368. *Id.*

*Flood* with express language in the opinion indicating that the *Flood* Court *had no intention* of limiting the exemption. Both the *Piazza* and *Butterworth* courts emphasized the fact that the *Flood* Court admitted that professional baseball was engaged in interstate commerce, but both courts failed to put that admission in context.

Consider the following paragraph from the *Flood* opinion:

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed.<sup>369</sup>

The *Piazza* court contended that *Flood* narrowed the scope of baseball's antitrust exemption from its post-*Toolson* status (the "whole business" exemption) to the reserve clause.<sup>370</sup> As the above paragraph indicates, one of the problems with the *Piazza* reasoning is that the *Flood* Court expressly declined to narrow or alter the exemption.<sup>371</sup> The *Flood* Court believed that any alteration of the exemption established in *Federal Baseball* and *Toolson* should be done by Congress.<sup>372</sup> This belief is absolutely irreconcilable with the *Piazza* court's contention that the *Flood* Court narrowed the scope of baseball's antitrust exemption.<sup>373</sup>

369. *Flood*, 407 U.S. at 284.

370. See *Piazza*, 831 F. Supp. 420, 436 (discussing history of exemption).

371. See *Flood*, 407 U.S. at 284.

372. *Id.*

373. One of the problems with the *Piazza* reasoning is that the *Flood* Court did not give legal effect to the conclusion that baseball was engaged in interstate commerce; the *Flood* Court refused to alter the reasoning supporting *Federal Baseball* and *Toolson*. The *Flood* Court clearly admitted that professional baseball was a business engaged in interstate commerce. However, such an admission does not mean that the *Flood* Court erased the rule of law established in *Federal Baseball* and *Toolson*.

The *Flood* Court chose to leave the *Federal Baseball* reasoning intact for stare decisis purposes. The *Flood* Court recognized that, since professional baseball's reliance on the exemption was significant, and since the American system of precedent requires adherence to the reasoning and result of prior cases, it would be impossible to have a case where the result is at odds with its reasoning (i.e. — although engaged in interstate commerce, professional baseball is not subject to antitrust laws). Hence, although recognizing that professional baseball was en-

## B. Conclusion

The history of baseball's three antitrust exemptions is confusing. After the *Flood* decision, state and federal courts considering the matter-of-law question of whether the exemption applies have succeeded in creating three exemptions from what originally was one. The critical observer need only consider the likely result if the *Piazza* case were tried in a district court bound by *Finley* to realize that the *Piazza* "reserve system" exemption is different from the *Finley* "whole business" exemption. Both the *Piazza* and *Finley* exemptions are different than the *Postema* "reserve clause and league structure" exemption.

Why are these distinctions important? It is clear that the *Flood* Court intended that, absent congressional limitation, professional baseball should continue to enjoy a certain level of antitrust protection. The *Piazza*, *Finley* and *Postema* cases demonstrate that the level of antitrust protection contemplated in *Flood* is far from certain. The fact that the *Federal Baseball* Court did not exempt professional baseball from the antitrust laws combined with the use of ambiguous language by the *Toolson* and *Flood* Courts in defining the scope of the exemption created a situation where professional baseball's antitrust protection is contingent upon a plaintiff's choice of forum.<sup>374</sup> The *Flood* Court clearly did not intend for the scope of

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gaged in interstate commerce, the *Flood* Court perpetuated the "rejected" reasoning of *Federal Baseball* and *Toolson* in order to cater to MLB's assumed reliance interest.

Also, *Piazza* fails to answer the following question: why would the United States Supreme Court create a result stare decisis situation in *Flood*, given that Judge Padova admits that result stare decisis counters rule stare decisis, the principle upon which the American jurisprudential system is based? The *Piazza* analysis does not make sense in this regard; the *Piazza* court performed a complex stare decisis analysis of the *Flood* opinion which the *Flood* Court did not endorse. See *Piazza*, 831 F. Supp. at 437-38; see also Respondent's Answer Brief at 34, *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994) (No. 82,287) (sarcastically noting that correct interpretation of *Flood* eluded everyone for 21 years before Judge Padova discovered it in *Piazza*); Lafferty, *supra* note 14, at 1286 (noting that "*Piazza* successfully limited the exemption to professional baseball's reserve clause through the creative utilization of stare decisis").

374. Professor Stone offers a possible reason for the various interpretations of the *Flood* opinion:

[H]owever much we try to conceal the truth by using singular terms like "case," "precedent," "decision" or "holding," the truth is that the *ratio decidendi* of a case has always to be sought in a body of judicial discourse, that is, of communications by judges which enter the legal materials as a more or less complex collocation of words in a written report. A case consists, in short, of words and mostly ordinary words. And it follows from this that what the *ratio* must or can be depends on the meaning of this discourse, most of which ("legal" though it may be) is still ordinary language. As such, for reasons already discussed, the symbols of which it

baseball's antitrust exemption to be contingent on a litigant's choice of forum.

The failure of the *Toolson* and *Flood* Courts to clearly define the scope of the exemption raises the issue as to whether baseball's antitrust exemption is entity-based (the exemption protects all activities of MLB from antitrust scrutiny) or conduct-based (the exemption protects a certain range of activity by MLB from antitrust scrutiny). If the exemption is entity-based, MLB can never be a defendant in an antitrust suit. If the exemption is conduct-based, MLB can be subject to antitrust scrutiny only if its actions fall outside the range of conduct protected by the exemption.

The *Finley* court concluded that the exemption is entity-based, while the *Piazza* and *Postema* courts concluded that the exemption is conduct-based. Given that the *Federal Baseball* Court held that the Sherman Act did not apply to a particular entity (the business unit engaged in the "business of exhibiting baseball games") or held that the Sherman Act did not apply to a broad range of behavior necessary to conduct the business of professional baseball, the *Finley* and *Postema* exemptions are more accurate analogues of the *Federal Baseball* holding than the *Piazza* exemption. However, since the antitrust exclusion established in *Federal Baseball* has been transformed into an antitrust exemption, the *Finley* and *Postema* exemptions will never be anything more than analogues of the *Federal Baseball* ruling.

The quest to define the scope of baseball's antitrust exemption is truly a riddle without one correct answer. The *Flood* Court stated that the exemption "rests on a recognition of baseball's unique characteristics and needs."<sup>375</sup> This conclusion certainly is not supported by language in either *Federal Baseball* or *Toolson*. Courts and commentators alike discuss the three opinions of the baseball antitrust trilogy as one unit without questioning whether the *Federal Baseball*, *Toolson* and *Flood* opinions stand for the same proposition. The reality is that the three holdings do not stand for the same proposition.

When the *Toolson* Court initially recognized an antitrust exemption for professional baseball on the grounds of stare decisis, the *Federal Baseball* exclusion became moot. Since the antitrust ex-

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consists have potentially more than one meaning. The number of meanings can be reduced, but it can rarely (if ever) be reduced to a point when the mass of words in the whole discourse can bear only one meaning for every later situation which can be argued to fall within its terms.

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375. *Flood*, 407 U.S. at 282.

clusion was transformed into an antitrust exemption, the relevant question switched from being a mixed question of law and fact to being solely a question of law. More specifically, the essential question changed from being whether professional baseball is engaged in interstate commerce to whether the challenged conduct falls within the antitrust protection established by *Toolson*.

The *Toolson* Court offered little guidance in defining the scope of the exemption. The *Toolson* Court used ambiguous language to define the exemption's scope: a cryptic reference to *Federal Baseball*.<sup>376</sup> The *Flood* Court merely recited the same language used in *Toolson*.<sup>377</sup> As a result, courts deciding the matter-of-law issue are left to set the parameters of the exemption as they deem appropriate.

While the quest to define the scope of the exemption is a riddle without one answer, that does not mean that there are no wrong answers. Regardless of the clarity of the Court's holdings in *Toolson* and *Flood*, there is a line which separates a justifiable interpretation of *Flood* from a violation of the Court's clearly-expressed belief that, if the exemption is to be altered, Congress should do it. The *Piazza* court crossed that line.

What should be done? Underlying professional baseball's three antitrust exemptions is a public policy issue — should MLB continue to enjoy protection from application of the antitrust laws? Congress is the branch of government charged with the duty to make that determination.<sup>378</sup> Congress must soon decide whether MLB should remain exempt from the antitrust laws. The proliferation in the number of exemptions indicates that the exemption issue demands congressional consideration. Courts determining the scope of baseball's antitrust exemption should not be allowed to ignore the catcher's signals while they are on the mound.

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376. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). The *Toolson* Court held that the business of baseball is exempt from the antitrust laws "so far as [*Federal Baseball*] determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Id.* At least one commentator has suggested that the *Federal Baseball* Court did not make such a determination. See McQuaide, *supra* note 208, at 98 ("Nowhere in the three page opinion of *Federal Baseball* can there be found any mention of Congress' intention that baseball was to be excluded from the scope of the antitrust laws as held by *Toolson*.").

377. *Flood*, 407 U.S. at 285 (quoting *Toolson*, 346 U.S. at 357).

378. *Radovich v. NFL*, 352 U.S. 445, 452 (1956) (noting that Congress is better suited than courts to confront issue of baseball's antitrust exemption).



